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OPERATION OF THE BOARD OF VETERANS' APPEALS

HEARING BEFORE THE SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE OF THE COMMITTEE ON VETERANS AFFAIRS HOUSE OF REPRESENTATIVES ONE HUNDRED FIRST CONGRESS

FIRST SESSION

JUNE 14, 1989

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OPERATION OF THE BOARD OF VETERANS' APPEALS

WEDNESDAY, JUNE 14, 1989

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMPENSATION,
PENSION AND INSURANCE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, D.C.

The subcommittee met at 9:15 a.m. in room 334 of the Cannon House Office Building, the Hon. Douglas Applegate, chairman of the subcommittee, presiding.

Present: Representatives Applegate, McEwen, Wylie, Bilirakis, Sangmeister, Evans, Penny, Jones and Parker.

OPENING STATEMENT OF CHAIRMAN APPLGATE

Mr. APPLGATE. The subcommittee is meeting this morning to conduct what has become an annual hearing on the operation of the Board of Veterans Appeals. Perhaps more than ever, it's important that we hear from the Chairman of the Board in order that we can closely follow the progress of the measures taken to implement judicial review of veterans' claims and to be apprised of problems the Board may run up against, especially in terms of resources and staffing.

The subcommittee remains concerned that the quality and timeliness of veterans' appeals remain at an acceptable level.

Similarly, the input of the veterans' organizations is necessary to bring to our attention the concerns of the veterans' community and to point out areas where further oversight may be necessary, or areas where additional legislation may be desirable.

I'm looking forward to hearing from all of our witnesses and, with that, I will recognize the vice-chairman of the subcommittee, Bob McEwen.

Mr. McEWEN. Thank you, Mr. Chairman.

OPENING STATEMENT OF HON. BOB MCEWEN

I, too, have been looking forward to today's hearing. Through our witnesses' testimony, and the added opportunity to engage in an open exchange of questions and answers, we should be able to determine where the appeals process stands today. That was the case last month during similar hearings on the Veterans Benefits Administration.

In an effort to make this hearing as fruitful as possible, I would encourage all of our witnesses to offer as much insight as they can.

There is not a person in this room who does not recognize the distressing scarcity of resources which confronts the Department of Veterans Affairs. But that omnipresent problem does not relieve any of us from our responsibility for ensuring that the Department's non-monetary resources are operating as smoothly as they can.

So I encourage all of our witnesses to share their knowledge freely, so we might refine processes within the Board of Veterans' Appeals, and take accurate measure of how the implementation of judicial review is progressing.

Thank you.

Mr. APPLEGATE. Mr. Bilirakis, is there anything you wish to say at this time?

OPENING STATEMENT OF HON. MIKE BILIRAKIS

Mr. BILIRAKIS. Mr. Chairman, I commend you for holding this hearing. I think we should hold oversight hearings on a regular basis on the Court of Veterans Appeals because it is such a new creature.

What I am saying is because it is a new animal, it's operations and mechanics are very much unproven. And so I see an awful lot of assertions being made here, which may or may not actually turn out to be meritorious. At this stage of the game, we haven't really had adequate history or experience with regard to this new appeals process.

So it will be interesting to hear this testimony. We've got to stay on top of the issue. We all feel very strongly about establishing this court.

Thank you.

Mr. APPLEGATE. Thank you, Mr. Bilirakis.

Of course, the purpose of the hearing is an annual thing and it has to do with the overall general operation of the Board of Veterans Appeals. And if we can get some information as to what's going on as far as the implementation of judicial review, we would like to be able to hear that, too.

And, with that, we have, first, Mr. Ken Eaton, who is Chairman of the Board of Veterans Appeals, and he will be accompanied by Mr. Ron Aument, special management assistant.

Gentlemen, welcome. Thank you again for being here before the committee. We look forward to your testimony.

STATEMENT OF KENNETH E. EATON, CHAIRMAN, BOARD OF VETERANS' APPEALS, DEPARTMENT OF VETERANS AFFAIRS, ACCOMPANIED BY: RON AUMENT, SPECIAL MANAGEMENT ASSISTANT, BOARD OF VETERANS APPEALS; AND JACK THOMPSON, GENERAL COUNSEL'S OFFICE

Mr. EATON. Thank you, sir.

I have with me Mr. Jack Thompson of the General Counsel's Office just in case we get into a judicial area.

You have my prepared statement. Are you ready for my summary at this time?

Mr. APPLEGATE. Yes, if you would, please.

Mr. EATON. Well, as you know, it is a pleasure to be here. And as you know, we have been preparing for judicial review of the Board of Veterans' Appeals' decisions.

And we're doing the best we can to implement the provisions of the Veterans' Judicial Review Act. We have worked hard on revisions for the new Travel Board Hearing Program, for notices to the veteran having to do with the Travel Board Program and all the judicial review matters.

We are completely restructuring the rules of practice of appeals regulations.

We're working with the General Counsel and trying to figure out just what role we'll be taking at the Board of Veterans' Appeals in the litigation process.

And as you may know, there is an intra-department working group, which is comprised of staff members from the Board of Veterans' Appeals and General Counsel and Veterans' Benefits Administration and even parts of the Veterans' Health Service Research Administration, and the Office of Budget and Finance, all working together to work on this task force on judicial review projects.

There is some increased workload at the Board and we've been putting additional efforts in quality review control. Our staffing has been reduced. And the result of these combined things:

There has been an increase in our response time.

I know you're concerned about that. We believe that in this mode, the present-day situation with judicial review and all of that, that about 150 days response time would be considered, we believe—should be considered—reasonable.

Frankly, we're more like a 170-day response time right now. We would like to be able to attain a 150-day response time.

There is a program we mentioned in the opening statement having to do with a management consulting firm that's looked at five different appeals programs in the government. And we feel that that shows a pretty good situation and reflects well on the Board of Veterans' Appeals.

It shows that we have the most complex and detailed level of work on appellate decisions and our unit cost is in the mid-range. We feel that's a good report.

There is a statistical table that's attached to my statement, which gives a great deal more detail on how we've been doing over the last 5 years.

And with that summary, I'm of course willing to answer any questions you might have.

[The prepared statement of Mr. Eaton appears on p. 27.]

Mr. APPLGATE. Thank you very much, Ken.

You say the average time now is 150 days—or 170 days?

Mr. EATON. Right.

Mr. APPLGATE. You'd like it to come down to 150?

Mr. EATON. Right.

Mr. APPLGATE. Or would like for it to come down to much less than that, of course.

Mr. EATON. Well, it used to be 135. We used to think that was reasonable. But, today, the way things are going, we think that the target of 150, we'd be very happy if we could reach that.

Mr. APPLEGATE. But you don't see that figure as an acceptable figure. You don't think that that's good?

The reason I say that, we're talking about 4 and one-half months as opposed to what we're doing now is somewhere around 5 and one-half months as opposed to what we're doing now as somewhere around 5 and one-half months on the average.

Either one seems like a very unacceptable figure to me. I mean, it just extends it out and it causes a lot of problems for the veterans themselves, dealing with them all the time.

Mr. EATON. We do get a lot of complaints on that, there's no question. And I'm sure Congress gets a lot of complaints having to do with the time it takes to get a Board decision. -

A few years ago, we used to be able to hold it around 110 days. It wasn't that long ago that 110 days was considered reasonable.

We got it up to 135 and thought that was reasonable, and now——

Mr. APPLEGATE. Well, how do we get it down then? I mean, it isn't impossible to do. Is it a matter of money? Is it a matter of staff?

Mr. EATON. Yes, of course. The budget situation, you know, everyone has got their problems, as VA has. We have to take our share of budget cuts and we have had significant reduction in our staff in the last couple of years.

Mr. APPLEGATE. But what would it take? That's what I'm asking.

Mr. EATON. Money, staff and space. We do need some space, but that's what it takes. There's no question we could do it.

Mr. APPLEGATE. Are you computerized to the extent that you feel it would be helpful in achieving that kind of a goal? Do you need more of that?

Mr. EATON. Not much. We are doing a little bit more computerizing all the time. But I don't think that's a problem.

Let me point this out. We have 21 sections of the Board. And if we were fully staffed and able to operate them at their highest efficiency, we do not need another section, operating section, to provide decisions.

We need the staff to help them so that they can get the decisions out. The 21 sections, 65 Board members could do the work. It isn't the Board members but the total staff needed to support those Board members.

One of the things that's happened in recent years, we're devoting more time on this full time, three-member review by the Board members. We have to borrow from our attorney staff a great deal. The senior attorneys, for example, have to help out, chip in to do this review. This draws from the number of attorneys we have available to support the Board members. And that's affecting us as well.

Our quality review and our additional Board member review is absorbing a good deal of time.

Mr. APPLEGATE. Ken, I understand that the VFW suggests that you consider asking for at least 460 more FTEEs for a total of 1990.

Do you plan on furthering that? Do you plan on asking additional full time employees?

Mr. EATON. We estimate that if we had 463 total staff, we could keep it at 150 days.

Mr. APPLEGATE. You could keep it at 150.

Mr. EATON. That's counting people that we need for the help in judicial review and the whole bit. We're on a downward trend right now, down to 403, being cut down to 403.

Mr. APPLEGATE. So you are going to ask in the next year's budget or the supplemental, you're going to ask for?

Mr. EATON. This is for fiscal year 1991. That is the opportunity for that one. Fiscal year 1990 of course has already gone through the President and it's set for 403.

Mr. APPLEGATE. Do you have any estimate of the number of cases where veterans will appeal BVA's decision to the new Court of Veterans' Appeals?

Mr. EATON. There have been any number of estimates. What is it? Do we think 5,000?

Mr. AUMENT. That was the largest number that we've heard thrown out. Around 20 percent of our denials may possibly go to the court, which would be around 5,500 cases per year.

Mr. APPLEGATE. Per year.

Mr. EATON. But, at this stage of the game, there's no way to really know. We're just guessing.

Mr. APPLEGATE. Well, but you do have to have some kind of a guesstimate.

Mr. EATON. Sure. And we use that estimate to some extent to figure out how much work we're going to have to do on those cases before they go to General Counsel, before they go to the Court.

We've got to prepare the record. We've got to keep a storage of all those cases that are subject to review by the court, and that's a problem. That's a space problem.

Incidentally, I've just talked yesterday with Mr. Principi and he's doing the best he can to try to help us out with some resources and some space.

He's working on it.

Mr. APPLEGATE. Where do you foresee that there will be space available? Do you have any idea? Do you have any—

Mr. EATON. I have. Now, there is a renovation project that's coming up in a year or two. A movement of various things. I was hoping maybe at that time we could get some space in the building we're in.

But I have no way of giving you any information about space. I tell them about it, that I have a need right now—in the next 6 months, I really should have another 10,000 square feet of space. Various things. The service organizations, the unit for judicial review, the storage of the files for this court. Various things.

I think we need 10,000 square feet. I don't have any idea where we're going to get it. It should be in the building that we're in. That's wishful thinking.

Mr. APPLEGATE. Yes. Well, it's true, it should.

Well, let me just ask you this question and then I'll let some of the other members ask something.

I see that you're strengthening your full three-board member review. And I think that that is good. But, what do you think of the BVA's procedures which will permit a hearing officer to be able to make a single signature decision?

Mr. EATON. Well, it seems to give an additional bite at the apple by the veteran. I suppose you could say that.

There seems to be some question about where that process stops. And my understanding now is that, at the time the substantive appeal is filed, then the hearing officer, single hearing officer, would no longer have any authority to make any changes in it.

Now, before that, he's making changes in the rating for his decision. One man is making the changes for the three on the rating board.

That, I think, I've got to leave to the Veterans' Benefits Administration. They're doing that and that has been approved, I believe, by General Counsel. And that's not in my jurisdiction.

Mr. APPLEGATE. Well, then, too, of course the concern we've had is about the hearing officer conducting the hearings.

What do you think about that?

Mr. EATON. Well, I know it's far more efficient.

The question is whether or not one person can substitute his judgment for three. That's of course the question.

And they have their budgetary problems. And they tie up the rating board for that hearing, that's three members that are tied up for quite a long period of time.

There's a great number of hearings going on in the field. And that's of course what the problem is.

That's why they're using one hearing officer.

But I do see what you're driving at, and that is there is a question here having to do with one person substituting his judgment for 3 members of the rating board.

Mr. APPLEGATE. Yes, it just doesn't seem right. You have a hearing officer, then you have your three-member board.

I guess it's like using a surrogate. I suppose it's like sending my secretary over to vote for me on the floor. I don't think that would quite work.

Mr. EATON. I can't argue with that. I would say though one thing in favor of it, and that is that none of that, to the best of my knowledge, can in any way be detrimental to the veteran. If you follow what I'm saying, it can only help him, because I don't think the hearing officer ever reverses the rating board and says, no, you shouldn't have allowed something.

They only reverse them to allow something the rating board didn't allow. So I don't know that the veteran is hurt by it, but there is a question theoretically of the principle involved, yes.

Mr. APPLEGATE. Yes, it's the principle. It's not a question of whether one person can make a decision, either favorable or unfavorable, or whether the veterans feel one way or the other. It's whether or not it's right or wrong.

And I guess that's a concern I have about it.

Mr. THOMPSON. Mr. Chairman, I might just point out, you gave the analogy of sending a secretary over to vote for you. These hearing officers are grade GS-13's, well-trained individuals. They have come up through the ranks, have rating board experience. They are fully competent to conduct these hearings.

Mr. APPLEGATE. Well, how about my administrative assistant?

[Laughter.]

Mr. THOMPSON. Well, actually, these hearing officers out-rank rating board members in terms of the pay grades. So that might be a different thing.

Mr. APPELGATE. Okay.

Mr. THOMPSON. And I might also point out that the veterans' service organizations so far, as reflected in testimony given last month, I believe, were generally quite pleased with the way it's working out.

Mr. APPELGATE. Okay. Thank you very much.

Mr. McEwen.

Mr. McEWEN. Thank you, Mr. Chairman.

Mr. Eaton, do you have a management plan or something that you're operating by? Are you implementing time tables, guidelines and efficiency reports, as to whether or not you're meeting your goals?

Mr. EATON. Yes. We have goals and objectives both for, well, for the attorneys and the board members and the BVA staff overall.

We have had problems recently meeting those goals, that's for sure, because of staffing cuts and changes in our procedures for review.

There has been some increase in the payroll, but not that much.

I assume that's what you're talking about, why we're not getting out the work.

Mr. McEWEN. I'm just curious. Everybody in the world at one time or another has to do certain things and with minimum resources.

I don't care if it's the school board or Chrysler Motors. The first thing a department head or a school superintendent does is to immediately, when you sit down with them, tell you they don't have enough money. I don't care if it's 1936, 1942, 1969, or 1989.

You begin with the fact that you don't have enough money. You begin with the fact you don't have enough people, and you begin with the fact you don't have much demand.

Then it's 1978, goods are going up and prices are going down and you've got to produce a new car and you've got to do it efficiently. How are you going to do that?

You get a plan together and you begin to operate without enough money and without enough people. You begin to turn the place around.

My concern is if you don't have a goal, then you'll always make it. If you don't have a target, you'll always get there. Therefore, I don't feel comfortable with the idea that we don't have enough people. If you're doing all of these things, I would like this oversight hearing to say "look, here's the increased demand, and here's how we're meeting it."

We are in a very unique position here in that my proclivity is to defend the VA because nobody ever comes to their defense. There are many, many dedicated, committed people working in stuffy buildings with inadequate supplies and with rotten pay and little respect.

Every time they step outside the door, a veteran says, "Oh, you work at the VA," and whops them up side the head. And that's the gratuity, that's the thanks that they get for working for the Veterans' Administration. I understand that.

If they have a Board of Rectors, it's got to be the Congress. What the Congress does periodically is bring them up here and whack them up side the head.

Then they say, "Isn't it fun working for the government for 20 years?"

So what they do sometimes is develop elephant hide, and sit there, go along and say, "The hell with everybody."

Now, I know that's an over-simplification, but that does exist, does it not?

Mr. EATON. I'm sure. I'm sure it does. I think I understand where you're coming from. And I would like to say that about 3, 4 or 5 years ago, we ran into a similar situation.

And at that time, we made the adjustments, but we didn't have the funds, the resources. We cut back on the time and effort devoted to each decision in order to get them out so that we wouldn't have this terrible backlog. We sacrificed one thing to get out another.

Right now, we consciously decided that we would prefer to absorb an increase in our response, our backlog, as opposed to sacrificing the quality and reducing the time it takes to do the BVA decisions. So that we did that purposely.

Mr. McEWEN. If this isn't done, then I think we're going to request that it be done.

We went through this in HUD in the Columbus, Ohio, office where everybody was overworked and having a hard time and there was no productivity requirement. Those are personal decisions. Or take FHA, where you take a farmer's income and you analyze how to qualify him.

How do you say you do one of those every 45 minutes?

You can't do it. So, in the course of not being able to do it, they were doing nothing at all. A fellow could go 2, 3 or 4 days and really study this. I haven't seen this done.

I need to know that it's being done, and that there is accountability as to when these things come in and as to what's to be expected. To say we don't have enough people and the days are getting longer isn't satisfactory to me.

I need to be assured that the reason the times are getting longer is truly because everyone is working at maximum capacity with high leadership, moral support, that there is a sense of camaraderie and commitment to the veterans, that this is a very noble cause for those that have been dealt an injustice by the system. You filter it out through the appeals process.

This is a noble cause and they're proud of what they're doing.

I haven't received this impression from your testimony this morning. Therefore, that's what I'm looking for, to make sure that's being done.

If it's not being done, then I'm going to be increasingly more critical.

What is the highest FTEE that you have?

Mr. EATON. About 4 years ago, it was about 440, 437. 437 about 3 or 4 years ago.

Mr. McEWEN. So you're at 403 today.

Mr. EATON. We're really about 410 right now, but going toward 403.

Mr. McEWEN. Well, I've consumed my time. I have more questions.

Mr. APPLEGATE. Before I recognize Mr. Bilirakis, I'll say that there will be questions that each of the members of the panel will be sending you and we would expect an answer.

Mike Bilirakis.

Mr. BILIRAKIS. Thank you, Mr. Chairman.

We're shuffling a lot this morning, and I hope that this panel and the subsequent panels understand what's happening here. The Democratic Caucus is meeting and I am very much involved in the Clean Air Act negotiations which are taking place right now. The Administration originally submitted its own proposal and there are others. And we have a briefing at 9:30, so here we go. We're trying to get it all in.

So, certainly, we're not trying to slight any of the forthcoming groups in the process of going in and out of this hearing.

As I indicated in my opening remarks, which were really premature and probably not at all timely, I'm focused on judicial review. I was one of those people who felt very strongly we ought to retain BVA in that process.

So I'm certainly not meaning to relegate you into a lower status in the process.

I was very happy to hear your testimony and also the response to the chairman's questions that your group is, in fact, addressing that forthcoming part of the puzzle, if you will.

And, again, until we have some history for the court, I know we're not going to be able to address all of the issues or even have the foresight to be able to see all of the problems that might arise and your part in them all.

But it does seem like you're certainly addressing them and trying to get as ready as you can. And I do commend you for that.

Because you're anticipating an additional workload as a result of the new court, and because you're anticipating further budget cuts, you're saying your FTE is dropping and it may stay at that point or it may even go further down. Who knows? I'm not sure that anyone does.

Because of all of that, there's a point that I had made previously at one of our hearings about preparation of claims.

I'm just wondering, are the claims that are coming in well enough prepared so as to help to expedite the process? Or could there be some improvement in those?

What I'm asking now, is could the assistance of the service officers, assuming that the service officer is involved in the processing of those claims, but I'm not really sure what the percentage is—but could we be helpful, "we" meaning all of us, in terms of a better preparation of claims so that, it maybe expedites the turn-around time so that it reduces the amount of times that this paperwork has to go back to the veteran for additional information, and things of that nature?

So that in itself, along with of course other efficiencies, might help this matter if, in fact, our real world is—and I'm not saying that we're going to accept that—if our real world is that we're going to have a reduction in FTEE?

It's quite a question I know.

Mr. EATON. It's true that until 4 or 5 years ago, our remand rate was about 15 percent, I believe, 13-15 percent. And it's been holding pretty close to 20 percent the last 3 or 4 years.

If we could get that remand rate down to 13-15 percent, it would cut our overall volume over a period of time because, you know, half of those cases remanded come back up.

So we are getting repetition there, and it would improve it.

I do believe the Veterans' Benefits Administration is trying hard to train its employees to prepare these cases, along with the service organizations. I know for a fact that the service organizations are spending more time and money and training on their service officers than ever before. They're working hard.

Of course, sometimes, that's counter-productive because they'll find more things that they can throw out as to why it should be remanded sometimes, too. So it may offset it.

But, the regional office employees have been hurting over the past number of years. Here I am talking for Mr. Vogel, you understand. This is not directly my line.

But our remand rate is up and it has been up for a number of years. But, if we could figure out a way to drop it, which we're not going to do, you know, just arbitrarily, we'll only do it if we find we don't need to remand the case, it would help, yes.

Mr. BILIRAKIS. Well, can we, getting to the regional officer level, can we be helpful, more helpful, in terms of training them, in terms of educating?

I frankly feel that they do a great job. But, can we possibly improve that process by spending more time with those people and by mandating more time with those people? What, in terms of training is possible, so that we can, hopefully, cut down the remand rate?

Mr. EATON. Well, of course, they have their budget problems. And my observation has been that whenever anyone in VA, whether it's the Veterans' Benefits Administration, or the BVA, whenever we're asked to provide personnel to help them in their training, we always do that. We don't cut back in that area at all.

So it's just a matter of how much time and effort they can devote to it and how much money they have available.

Mr. BILIRAKIS. Thank you.

Thank you, Mr. Chairman.

As long as the chairman is not quite ready, do we have a percentage figure in terms of how many of these claims are actually worked on by the service officers compared with those that are not?

Mr. EATON. Oh, yes, we do.

Mr. BILIRAKIS. Well, maybe you can submit that to the record, in the interest of time, Mr. Eaton. I appreciate that.

Mr. EATON. All right. Yes, we have detailed information on each service—

Mr. BILIRAKIS. Great. If you can submit that to us for the record, I'd appreciate it.

(Subsequently, the Department of Veterans Affairs submitted the following information:)

The following figures indicate, by year, the percentages of BVA decisions in which appellants were represented by nationally recognized service organizations.

<i>Fiscal Year</i>	<i>Percentage</i>
1989 (first half).....	76.5
1988.....	78.5
1987.....	78.5
1986.....	79.0

Mr. APPLEGATE. Ken, you said in your statement that the proposed regulations and rules of practice are nearly ready for publication in the Federal Register.

Can you give us any kind of idea when the publication for comment will occur?

Mr. EATON. I had a bet with my assistant. He thought he was going to get it in there by the first of June, and he lost that bet.

Mr. APPLEGATE. You got any ideas now?

Mr. EATON. First of July, he says now.

It's hard. You know, the red tape involved in those things is really something.

Mr. APPLEGATE. Is he taking bets on that, too?

Mr. EATON. I'll buy him a drink if they get it through by the 1st of July.

Mr. APPLEGATE. Okay.

Well, I thank you very much for coming before the committee. And as I said, we will have questions that we will submit. But, again, we thank you for your statement and answering our questions.

Mr. APPLEGATE. Mr. McEwen.

Mr. McEWEN. Let me say that, in my effort to explain my question, I didn't ask for a response.

Mr. EATON. Yes, and I had one, too. But now let me—I've got to rethink that point.

Mr. McEWEN. The point is this. I can't really form a judgment. I understand the VA is overworked. I don't care if we're talking about medicine and surgery or if we're talking about mowing the cemeteries. It's overworked and underpaid and understaffed.

I need to know whether or not there is some sort of gauge or measuring stick whereby we can judge how we stand on this.

Mr. EATON. There certainly is. There's a number of them. And there's a couple of them that don't look all that good.

Probably, the best and the easiest way to measure it is the number of decisions we do per FTE.

In other words, regardless of whether we've got 460 or 400 or 300, we should do so many per FTE. And that's a very good way to measure it.

Now back a few years ago, we used to be able to do pretty much around 100. But we're down, say, to like 96. We have dropped.

There are reasons for that, of course. But, still, they tell you there's been a slight drop.

Mr. McEWEN. Let me tell you, that's what I want in an oversight hearing. I don't know if you want to do it in my office. I don't know if you want to write a report, or you want to write something, but I want to be able to form a judgment as to whether or not your office is doing its best, this is life in the nineties, or if there's much that can be done.

Secondly, DAV mentioned about the new Form 1-9 which says: "Most appellates do not choose to appear personally at a hearing."

I'm not real sure who came up with that, but they have a concern about it.

Mr. EATON. There is that remark in the forms. Is that what you're saying?

Mr. McEWEN. Yes.

Mr. EATON. We'll look into that. I see the point.

Mr. McEWEN. That's right.

Mr. McEWEN. Okay. Thank you very much.

(Subsequently, the Department of Veterans Affairs submitted the following information:)

The Board has re-examined the proposed revisions to VA Form 1-9 which appeared in the draft previously furnished to service organizations. In response to the concerns expressed, the questioned sentence has been deleted.

Mr. APPLEGATE. Okay. The next panel will be Mr. John W. Bill Rolan, legislative committee, American Ex-prisoners of War; Phil Wilkerson with the American Legion; and Bob Manhan from the VFW.

I guess we can take them in the order we have them. And, Bill Rolan, you're listed number one, so why don't you go ahead.

STATEMENT OF JOHN W. (BILL) ROLEN, LEGISLATIVE COMMITTEE, AMERICAN EX-PRISONERS OF WAR; AND PHILIP R. WILKERSON, ASSISTANT DIRECTOR, NATIONAL AFFAIRS AND REHABILITATION COMMISSION, THE AMERICAN LEGION; AND ROBERT MANHAN, SPECIAL ASSISTANT, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS

STATEMENT OF JOHN W. (BILL) ROLEN

Mr. ROLEN. Mr. Chairman and distinguished members of the committee, on behalf of the 30,000 members of the American Ex-Prisoners of War, I want to assure you that the quality and timeliness of service provided by the Board of Veterans' Appeals are not only of vital concerns to former prisoners of war and your committee, but must also be to the Board of Veterans Appeals.

Many of the problems that we were well aware of, prior to Public Law 97-37 becoming law, are still with the ex-prisoner of war, although, gentlemen, you have passed a number of presumptions by the POWs so that service connection can be established. The VA's own study of POWs in 1980 documented that long-term health consequences frequently occur and that POWs invariably lacked adequate service records concerning injuries and illnesses suffered during confinement.

The practical problems of obtaining fair and equitable resolution of their legitimate claims were recognized by Congress which sought then, and via later legislation, to correct with presumptives.

The VA POW Advisory Committee established by that legislation has repeatedly affirmed that the adjudication procedure, as implemented, is not effective for many deserving ex-prisoners of war.

Adjudicators lacking firm directives on presumptives makes flawed ratings and this is compounded by BVA when it denies an appeal to correct a flawed initial rating.

The VA has continued to insist that these additions to the presumptive list that we have worked to gain for POWs are unneces-

sary, that these conditions are already being granted on a direct basis upon review of "available" medical evidence.

The medical evidence that exists is of a recent time frame and not usable to establish service-connection, that, plus the fact that medical records, if any, from enemy files are simply not available.

The presumptive is necessary. It is the only way we are able to establish service connection.

Since 1972, the VA has indicated burden of proof to be with the VA. This was and is to assure former prisoners-of-war fair and equitable resolution of their claims where history has shown records to be inadequate.

In most cases, it is totally lacking.

It has been stated that mere suspicion or doubt is not a justifiable basis for denying a claim.

Yet, adjudicators repeatedly tell our national service officers you cannot apply these concepts without more explicit instructions from the central office.

The addition of a hearing officer and the new Veterans Court should, without doubt, improve the chance of the veteran receiving a fair evaluation.

The Veterans' Administration and its successor, the Department of Veterans Affairs, was and is intended to be a friend of the veteran, whose sole purpose in life is to assist the veteran, and to service connect if possible.

Attempts to find ways not to do this is both counter-productive and in opposition to its intended purpose.

The American Ex-prisoners of War appreciate this opportunity to appear before you today.

Thank you.

Mr. APPLEGATE. Thank you.

[The prepared statement of Mr. Rolan appears on p. 31.]

STATEMENT OF PHILIP R. WILKERSON

Mr. WILKERSON. Thank you, Mr. Chairman.

The American Legion believes Public Law 100-687 will have a profound and salutary effect on the adjudication and appellate process of veterans' claims.

There are, however, a number of complex questions and issues associated with this landmark legislation; development of the required rules, regulations, policy guidelines, both for the Court and for the Department of Veterans' Affairs which will of necessity take time to complete.

While it is still too early to offer specific comment on how VA and the Court of Appeals will handle cases, we believe the regulations which have yet to be released should address a number of issues.

Although the Doctrine of Reasonable Doubt is now codified into Title 38, we do not believe this, in and of itself, will ensure its proper application. Regulations should clearly define the Doctrine of Reasonable Doubt and how and when it should be applied, in terms which are both understandable by both VA adjudication personnel and the claimant.

Also codified in the title is the provision for independent medical expert opinions at any stage of a claim. It is important that VA in the course of assisting the claimant in the full development of pertinent facts in a case utilizes all available resources, including medical opinions from the Chief Medical Director and IMEs.

The Board of Veterans' Appeals is in the process of revising VA Form 1-9 to include additional information concerning access to traveling board section, other personal hearings, preparation of the substantive appeal, attorney representation, and the Court of Veterans' Appeals.

This revision should enable claimants to make a more informed decision concerning their appeal.

With respect to the current operations of the Board, we remain concerned by certain problems at the Regional Office level and at the Board which, in our view, directly affect the quality of appellate decisions.

The percentage of cases remanded by the Board for additional evidentiary and due process development has been increasing over the last 4 years. At the end of the second quarter of this year, it stands somewhere around 21 percent.

Additionally, over 20 percent of the cases remanded are allowed by the regional offices following the required development. The allowance rate has also increased slightly.

With the loss of experienced, trained and productive adjudication personnel, there has been an erosion of the quality of decisions at the Regional Office level, in our opinion.

While the BVA has acted favorably to correct deficient action through additional development in a substantial number of claims, we are concerned that, in too many instances, claimants are forced to lengthy and unnecessary appeals.

We believe that over a period of time, the new Adjudication Academy to be established by the Veterans' Benefits Administration will help improve the quality of adjudication and, hopefully, favorably impact a number of cases which eventually go to the Board.

With respect to the issue of quality of the Board's decision, we have some concern as to the expertise and training required for Board members in particular positions.

It must be noted that there is only one specialist in psychiatry at the Board presently. Obviously, this means that many cases are decided by individuals, including the medical members who have little or no training or clinical experience in the field of psychiatry. The same situation applies to many other specialized fields where expertise is limited or lacking at the Board.

The physician assigned to a section may well be less qualified medically than the specialists who have actually examined, diagnosed and treated veterans.

In summary, the Board of Veterans' Appeals must be able to assure veterans that their claims will receive full and fair consideration in a timely manner; although this process now provides for recourse to the Court of Veterans' Appeals, we would much rather see the problems of quality directly addressed and further improvements in basic patient claims with adequate emphasis on continu-

ing education and training both at the Regional Office and the Board of Appeals.

Mr. Chairman, that concludes my statement.

Mr. APLEGATE. Mr. Manhan.

[The prepared statement of Mr. Wilkerson appears on p. 35.]

STATEMENT OF ROBERT MANHAN

Mr. MANHAN. Thank you very much, Mr. Chairman.

The VFW statement is already a matter of record, so I'll only repeat the one recommendation the VFW made regarding the BVA. And that was: If possible, the BVA should be authorized a 1990 fiscal year manning level or FTEE for a total of 460 spaces. The rationale we used consisted of the following six elements.

First was timeliness. We know that for the first half of this fiscal year, the BVA has fallen behind. That is, they have increased their processing time by about 30 days, as the chairman has already told us.

The second consideration was quality and quality control. I think the BVA is doing a very decent job considering additional requirements this year unique to judicial review considerations, plus the volume of cases they're handling at their present authorized manning level.

The quality control involves the several factors we discussed and doesn't vary significantly when you look at it percentage-wise; plus 1 or 2 percentage points here or there.

But, when you consider a volume of about 40,000 cases, 2 percent of that is 800. I'd hate to be one of the people adversely affected by a bad decision.

The third consideration is judicial review. You've already heard the chairman discuss that. We believe that, eventually, BVA will need 15-20 people in a new section because they're going to take on a new function.

We'll call it the COVA holding section. As we all know, when a veteran receives an adverse decision, that is his issue has been denied by BVA, the veteran has about 120 days to decide if he or she wants to appeal to COVA.

Somebody must keep 15,000-20,000 cases with the associated C-file some place here in the BVA Washington, D.C. area to account for that administratively. That's just the tip of the iceberg.

The fourth element is that the BVA's fiscal year 1990 FTEE calls for 403 persons; that's 14 people less than they are currently authorized.

The fifth consideration was the fact that in May a Federal district court required the Department of Veterans' Affairs to come up with new standards regarding Agent Orange cases. We know that there are approximately 34,000 Agent Orange cases that historically have been processed through the Department of Veterans' Affairs. Those Agent Orange cases that were at BVA had correctly been returned, of course, to the ROs, the regional offices, to give them again a new first shot in applying the new standards.

The VFW believes that at least 2 to 3 percent of these 34,000 cases will ultimately be appealed at least to the BVA level. So

we're anticipating a specialized additional workload that will come on line in fiscal year 1990.

And the last element was the success of the hearing officer program. Those men and women who do go out to the ROs all come from the BVA. It's a matter of record that we had the opportunity and pleasure to testify how favorably the VFW and our sister service organizations looked upon the Hearing Officer Program.

And the VFW had two recommendations why the Hearing Officer Program should be expanded.

In summary, if we can get some of these additional spaces for the BVA, if Department of Veterans' Affairs feels it's justified, we think they'll have more flexibility to continue to perform an extremely critical function, because how well or how not so well the BVA functions next year will determine how busy COVA will be.

Thank you, Mr. Chairman, for the opportunity to summarize our position.

[The prepared statement of Mr. Manhan appears on p. 42.]

Mr. APPLEGATE. Thank you very much, Bob.

Let me just throw this out just to quickly find out from you, Bill, first, if you agree with the VFW's proposed FTEE of 460 for fiscal year 1990?

Mr. ROLEN. I'm not familiar with that phase of it, so I'm really not sure.

Mr. APPLEGATE. All right. Phil, does your organization have any—

Mr. WILKERSON. We have no specific position on what numbers might be adequate to the Board's current operation. I certainly agree with the thrust of that proposal. Probably at a minimum it would be the number that we required in view of the certainly anticipated increase in various workloads.

Mr. APPLEGATE. Okay.

Mr. MCEWEN. Thank you all very much for your testimony. It is encouraging. I appreciate your comments and the ones included here for the record.

Bill, I outlined a couple of paragraphs about the fact that lacking firm directives on presumption, the adjudicators make flawed ratings, compounded by DVA when it denies an appeal to correct a flawed initial rating because, evidently, from your testimony, BVA feels that the presumptive list that was worked out is unnecessary, and they aren't responding to it.

These conditions are already being granted on a direct basis upon review of available medical evidence and do not need to take into account that there are presumptions for POWs, according to Mr. Vogel.

You make that point forcefully and regularly. Do you feel that the BVA is especially callous?

Mr. ROLEN. Now on many of the presumptions, when we've been here before legislation hearings, that they seem to think that we didn't need any of the presumptive things that was finally passed.

Since they have been passed over the country, there's many places where the service officers seem to think that they're not really considering the presumptives as they should.

I'm not sure if that's correct. But, in some parts of the country, if you go to one area, the presumptives, they really consider them and they get their compensation.

In other areas, it seems to be somewhat different. And I think this is a problem where they were looking on the presumptive things that different parts of the country looks at the thing different.

Mr. McEWEN. I thank you.

I would just emphasize—do you have an ongoing relationship with them? Do you present that to them?

Mr. ROLEN. They have presented some to them. There's a list being made now by our National Service Officer, and I'd be glad to present it to you, or to them if they would—

Mr. McEWEN. I want to know how actively we need to be involved. I mean, if you're working with the Board and you're making this case, I would just remind you that all of us need a reason to exist. The Ex-POWs is one of my favorite organizations, and I just want to make sure that we don't hit on one note and hit it so hard that the people become deaf to it.

If there is some appreciation for what's going on there, then we need to reward that as well. But, if they are not understanding it, after the Congress has determined, and many of us believe that there should be a presumptive consideration for some POWs, then, if that does exist, I want you to bring it to them, or bring it to us.

Mr. ROLEN. Well, they are considering the presumptives, but just in some cases, it seems it's unfair. We can give you some cases if you would like to see them.

Mr. APPLEGATE. I would just urge that the Ex-POWs as well as others come up with what they just referred to as cases. And I would urge that, if you could give us some specifics on these cases so that we would know what these cases are and whose involved so that we would have a chance to review them, it would be very helpful to us.

Okay. Thank you very much.

All right, next we will have John Bollinger with the PVA; Rick Schultz, the DAV; and Dick O'Dell, the VVA; and also Paul Egan.

We welcome you fellows to the committee once again.

John, we'll just start with you, since you're number one.

STATEMENTS OF JOHN C. BOLLINGER, ASSOCIATE LEGISLATIVE DIRECTOR, PARALYZED VETERANS OF AMERICA; AND RICHARD F. SCHULTZ, ASSOCIATE NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS; AND RICHARD O'DELL, VICE PRESIDENT, CHAIRMAN OF VVA'S COMMITTEE ON ADVOCACY; PAUL S. EGAN, LEGISLATIVE DIRECTOR, VIETNAM VETERANS OF AMERICA

STATEMENT OF JOHN C. BOLLINGER

Mr. BOLLINGER. Thank you very much, Chairman Applegate, and members of the subcommittee. On behalf of PVA, I'd like to take this opportunity to thank you and to testify on the operation of the Board of Veterans' Appeals.

I'd first like to express our gratitude for the subcommittee's markup of H.R. 1334 and H.R. 1336 this morning.

As you know, we strongly supported both bills. Your legislation to remove the pension reduction in pension benefits for hospitalized pension recipients will provide significant relief for some of our Nation's most needy veterans.

We appreciate the efforts of this subcommittee and staff to ensure the passage of this legislation. We look forward to working with you in any way we can to enact both bills into law.

Over the course of the past year, some of the most significant changes in the history of the agency have taken place.

We're encouraged by these events, which have included the enactment of judicial review, improvements in the adjudication process and the elevation of VA to Cabinet status.

Collectively, we believe these events have laid the foundation for a more equitable and quality-conscious agency.

The technical process by which the best interests of all veteran claimants can be represented is now on the books. The Committees on Veterans' Affairs have provided the foundation. It's now essential that appropriate resources be made available in order for the intent of the 100th Congress to be served. Only then will veterans have reason to truly be optimistic about the direction which the Department is headed.

As we enter this era of judicial review and the Department begins implementing new adjudicative and rulemaking procedures enacted in Public Law 100-687, it's clear that oversight examination and evaluation of the Board of Veterans' Appeals is essential.

Over the years, we have found the appellate process to be basically equitable and just. For the most part, we believe the system works and we believe the Board has the veteran claimant's well-being in mind.

With the enactment of judicial review and other improvements in the adjudication and appellate process, the system has the best potential it has ever had to fully serve all veterans.

There are various features regarding the Board that we are concerned about. Quality and timeliness of the adjudication and appeals process at both BVA regional offices and the Board of Veterans' Appeals certainly needs improvement.

We continue to be concerned that due to budget cuts, staffing reductions and the increased complexity of claims before the regional office and the board, the Department is today less responsive in its timeliness and accuracy in claims processing.

Statistics recently provided by the Board indicate the response times have climbed from decade lows of 110 days just several years ago to 170 days in the first half of fiscal year 1989.

When cases are reconsidered or remanded, response times are much longer. In the interest of accuracy and quality, we recognize there is a certain trade-off concerning response times.

Without question, a balance must be struck in favor of quality.

Congressman McEwen, I certainly appreciate your concern and your comments this morning to the Chairman regarding there must be some manner in which we can assess the way the Board is utilizing its employees at this point, given the fact that we don't have the resources and we don't have the FTE that we used to.

Once that's established, and if it's found that the Board isn't providing or working up to its potential, perhaps we can do something

about it. If, in fact, there comes a point in time when we discover the Board is doing the best it possibly can, then we still have that trade-off between response time and quality that we must contend with. I suggest that if additional resources and FTE aren't supplied and the workload does continue to increase, obviously, that trade-off isn't going to be a desirable one. Something is going to have to suffer.

Obviously, deficiencies in the Veterans' Benefits Administration directly affect the performance of the Board of Veterans' Appeals. We understand that one in five cases submitted to the Board must still be remanded, and that's little change, if any, from last year when we testified. Too many errors are being made by the regional offices resulting in time-consuming remands. Unless this problem is adequately addressed, response times will continue to increase at the Board as more and more cases get backlogged at regional offices and staffing shortages continue to prevail.

Although it's difficult for us to measure whether the quality of BVA appeals has improved since last year, our National Appeals Office believes the Board is being more thorough in their review of cases.

That concludes my testimony, Mr. Chairman.

[The prepared statement of Mr. Bollinger appears on p. 42.]

Mr. APPLEGATE. Thank you, John.

Mr. Schultz.

STATEMENT OF RICHARD F. SCHULTZ

Mr. SCHULTZ. Yes. Thank you, Mr. Chairman.

On behalf of the more than 1.2 million members of the DAV and our ladies auxiliary, I wish to thank you for the opportunity to appear here today. I also wish to thank you for marking up H.R. 1336 to bring the marriage criterion line for DIC recipients under the presumptive basis.

The oversight activities of this subcommittee over the past several years have had a meaningful impact on the operation of the Board of Veterans' Appeals. It sends a clear message to BVA and our Nation's veteran population that nothing less than top-quality, timely appeal determinations are to be rendered on veterans' appeals for benefits from the VA.

Mr. Chairman, in addition to the 280 national service officers, DAV employees, we also maintain a National Appeals Office in Washington, D.C. This office is staffed by nine highly-skilled national appeals officers, two staff counsel and a medical consultant.

Mr. Chairman, as you know, BVA has in place a quality review program which subjects BVA decisions to a multi-level review process. We note that during fiscal year 1988, the DVA subject 17.2 percent of their decisions to a second level intensive quality review process.

This is down from 18.5 percent in fiscal year 1987. We are pleased to note, however, that during the first half of fiscal year 1989, 26.4 percent of all of BVA's decisions have been subject to the second-stage quality review. Hopefully, BVA will continue to subject a high number of their decisions to this in-depth quality review process.

In regards to the timeliness issue, Mr. Chairman, according to BVA statistics during the first half of fiscal year 1989, it has taken BVA an average of 166 days to process an appeal. This is fully 30 days more than it was last year. When you add this number to the time it takes an appeal to be processed at the regional office, it takes nearly 1 and one-half years to process an appeal for a veteran.

Mr. Chairman, there are a number of factors which affect timeliness in the appeals process. These include an increase in number of appeals, greater emphasis on quality review and a continuing decline in the number of employees available to process the appeals.

Mr. Chairman, DAV is concerned that when COVA commences operation on September 1, 1989, there will be new administrative burdens placed on BVA, burdens which we believe they are ill-equipped to handle in terms of staffing.

In discussing this issue with Mr. Eaton, the Chairman of the Board of Veterans' Appeals, we are informed that BVA projects the need for 20 additional FTE to handle the workload and also they will need space to file possibly an additional 20,000 cases which are to be held at the Board following BVA decisions for a period of 150 days.

While we certainly understand the need to maintain an accurate record for COVA, we can foresee some problems as a result of holding the cases for 150 days at BVA following the decision.

As you know, VA regional offices must promulgate the ratings. In their attempt to promulgate ratings without access to a VA claims folder, they can run into some problems which could include—as you know, veterans often have unrelated claims pending at regional offices while the case is at Board of Veterans' Appeals, and these would not be able to be processed without the client's folder, because many times the evidence needed is contained in that file.

Also, I think, suffice it to say that the policy of holding these claims folders for this 150-day period will cause many administrative problems, and these problems must be worked out if veterans are to receive the benefits granted by BVA in a timely manner.

Mr. Chairman, at this time, I would like to briefly comment on the VA Form 1-9 proposed changes. My first observation about the proposed new 1-9 is that it contains three pages of information of instructions in very small print.

Perhaps these instructions could be printed in a pamphlet to accompany this 1-9. Also, Mr. Chairman, this revised form contains a statement, and I quote:

"Most appellants do not choose to appear personally at a hearing."

In our view, this is an unnecessary and unacceptable statement and could result in the discouragement of some appellants from requesting a hearing when, in fact, a personal hearing may be in their best interest.

And as you know, those veterans who appear at personal hearings, their allowance rate is much higher.

Thank you.

[The prepared statement of Mr. Schultz appears on p. 51.]

Mr. APPLEGATE. Okay. Thank you, Rick.

I'm going to have to go and vote and I'm going to turn the gavel over to the vice-chairman, Mr. McEwen. But, before I do, I would just like to say to John and to the PVA, thank them very much for the support for H.R. 1334.

It was their idea. It was their legislation, and it went through the committees. I want to give credit where credit is due. And we're glad to see that go through the subcommittee, and I see no problems with it going through the full committee.

Mr. BOLLINGER. Well, thank you very much, Mr. Chairman. We appreciate your effort and the effort of committee staff and all the co-sponsors. So we really do appreciate that. Thanks.

Mr. APPLEGATE. Okay. And to the Disabled American Veterans, and Rick, you had mentioned it, H.R. 1336, which was a couple of years ago, brought that up and we hadn't been successful up until this point. But we hope we will be this year, and I thank you for your support. It was your idea, and I want to give you credit, and your organization, for submitting that to us.

Mr. SCHULTZ. And I would also like to thank you, Mr. Chairman, for your support and, hopefully, this year, we'll be able to persuade the Senate to accept that.

Mr. APPLEGATE. I hope so. Thank you.

Paul.

Mr. EGAN. Thank you. Rick O'Dell is going to summarize our statement, Mr. Chairman.

STATEMENT OF RICHARD O'DELL AND PAUL S. EGAN

Mr. O'DELL. Thank you, Mr. Chairman, members of the subcommittee.

The Vietnam Veterans of America appreciates the opportunity to present its views on the operations of the Board of Veterans' Appeals. We will frame our testimony by commenting on a variety of new regulations designed to govern adjudications in light of the Judicial Review Act.

The VVA was anonymously supplied with a copy of an April 24, 1989 working draft of the new regulations, and we shall use that document as a base from which to offer our comments.

Whether or not subsequent adjustments in the draft have been made, it remains fully appropriate in our view to express reservations. In this way, if remedial changes in the draft regulations have failed to be made, at least that failure won't have escaped the attention of the subcommittee.

As the subcommittee will recall, VVA advanced the view at the October 6, 1987 hearing that the Board of Veterans' Appeals was inappropriately compromising its appellate independence and objectivity by stimulating production with year-end bonuses for high-producing BVA sections and section members.

We also called to question at that hearing the appellate propriety of holding BVA section members and staff attorneys to production quotas. On June 7, 1988, presumably in response to a lawsuit filed by the VVA on May 5, 1988, Chairman Eaton suspended the use of year-end bonuses.

Added to this and in full view of the fact that Chairman Eaton has stated at public hearings that he remains interested in finding

a way to replace the year-end bonuses, the prospect of spurring production through the uses of promotions, demotions, inter-sectional transfers and GS grade or step increases continue to threaten the objectivity, thoroughness and integrity of appellate claims adjudications.

Another of the practices at the Board of Veterans' Appeals raised in both our May 5, 1988 lawsuit and at the subcommittee's August 11, 1988 hearing is the practice in which members sign off on an appellate decision without having reviewed the claim.

We are unsure of any specific actions taken by the BVA Chairman to either halt or curtail this practice. This is not to suggest that the practice continues to be as common at the BVA as it was prior to the filing of our lawsuit.

Indeed, the Chairman may have taken some steps to curb the use of courtesy signatures.

As mentioned at the outset, the VVA has been anonymously provided with a draft copy of the regulations designed to implement that part of the Veterans' Judicial Review Act of 1988, which deals with the BVA.

The text of this document is 198 pages in length, covering a broad range of issues, many of which extend well beyond the intent and requirement of the Veterans' Judicial Review Act itself.

From a limited review of the working draft, it must be noted that there seems to be clear intention to augment the BVA's Chairman powers and authorities beyond that which was intended by Congress in the VJRA.

It is also apparent that DVA's new BVA regulations as outlined in the working draft, seem somewhat hostile to due process considerations.

Given the complexity and wholesale nature of the new BVA rules, it may be worth the subcommittee's while to firmly encourage the DVA to adopt a mechanism for development of the new rules in an open environment in which interested parties could participate in the process of rules development.

Such a mechanism is used by a variety of other agencies that are also subject to the Administrative Procedures Act. Instead of publishing the new regulations in the Federal Register and offering a limited period for comment, a period almost surely inadequate given the breath of the new regulations, we suggest that a notice be published in the Federal Register announcing a request for regulatory negotiations with interested groups with a clear stake in the outcome of the regulatorily reformed Board of Veterans' Appeals.

Such a process would cast sunshine on the regulatory development process and send a clear signal to the veterans' community that the agency is willing to do the serious business of veterans' claims adjudications in the open.

Mr. Chairman, we had discussed earlier and in our testimony a number of the working draft rules that are cited. I'd like to touch on just a few of them briefly.

One of them is the proposed new regulation that gives the authority to the BVA chairman to redesignate chief section members and the further authority to redesignate law members of sections to be chief members.

Instead, the Chairman should be required to fill the chief members' positions using a specified criteria such as seniority, qualifications, and most certainly on the basis of expertise in the areas over which specific sections judge appellate claims.

I would also in closing note that there are a number of other working draft rules in the body of our testimony. We would urge the committee to review those carefully.

Thank you.

[The prepared statement of Vietnam Veterans of America appears on p. 57.]

Mr. McEWEN (presiding). I thank all of you for your testimony this morning and your contribution.

John, in my reading of the testimonies, I overlooked something that I should have asked the Chairman because, in reading the BVA and the PVA's testimony on the BVA and the DVA—

[Laughter.]

Mr. McEWEN (continuing). I thought that the suggestion of the length of time for consideration of an appeal by the DVA could be 500 days was a suggestion that was made by the PVA.

Now you tell me in your testimony that it was the BVA who projected the response time and appeals could reach 500 days by 1995.

Therefore, I should have asked him, but I'll ask you.

Where was that made? Was it included in their testimony this morning? It is of no small concern to me.

Mr. BOLLINGER. In the process of our preparation for the hearing, we interviewed the Chairman and BVA management. And during the course of those interviews, we understood that over the course of the next 5 or 6 years, response time could actually become that high if no other changes are made.

Mr. McEWEN. I appreciate your bringing that to our attention.

Yes. Since there's nobody here but us girls and the goal is to make this as efficient as possible, Ken, would you like to make a comment on that, or not?

It is something that had I understood it better, I would have asked you originally.

Mr. EATON. As a matter of fact, I have in front of me here a graph that I will provide you. And it's an extension—you have to understand what this means. But, by 1995, if we were to stay at the FTE that we are scheduled to stay at now—you understand, this 403 that we were talking about—if we were to stay at 403 and do the job that we were expected to do, then it would escalate like that.

And it would reach 500. I would certainly hope that would never happen, but that's where that comes from. That's right.

I'll provide this for the record.

(See p. 73.)

Mr. McEWEN. Thank you. Let me say that the Chairman has asked of all the panels, and my only question to this panel will be:

How do they feel about the request for 460 FTEEs?

I think the suggestion which you've made, and which was brought to our attention by the PVA is an important ingredient, and I would encourage you to include such projections in your testimony.

The chairman wants the response of each of the service organizations concerning your observation as to whether or not the 460 full time equivalent employees is sufficient to handle this burden.

Mr. BOLLINGER. Mr. McEwen, I really have no way of knowing whether the number 460 would be proper at this point. We've testified on numerous occasions and certainly at this hearing today that we believe, given the enactment of judicial review, the complexity of it claims, and the reasons go on and on, that an increase in FTE would be appropriate for the Board of Veterans' Appeals.

So, given the reasons that have been expressed this morning, I would imagine 460 would be acceptable.

Mr. SCHULTZ. Yes, Mr. McEwen, again, as John, I have no idea if 460 is the right number, if that's what it takes. I think something along the lines of your suggestion, to take a good look at what they're doing and what do they really need to process the claims in a timely manner, would be helpful.

Also, I think that, if you look at their current FTE and the fact that we have judicial review, the fact that they've already said they'll need an additional 20 just to take care of the COVA requirements—that has nothing to do with getting into the increased backlog—surely, a substantial increase in their staff at this point would be warranted.

Mr. O'DELL. Mr. McEwen, we see no problems in increasing the FTE of the Board of Veterans' Appeals. I think there has been much attention to the issue of timeliness in rendering appellate decision.

And, certainly, with the new Court of Veterans' Appeals coming on line, VVA would like to express its concern not only with the issue of timeliness, but certainly the need of the Board of Veterans' Appeals through perhaps additional employees to render a quality decision.

It seems to us that the primary focus of the Board should be to render a quality decision at all times.

And with that, we could support the expansion of FTE.

Mr. McEWEN. I would ask all of you a somewhat similar question.

Rick, you mentioned that rewarding efficient workers was inappropriate. What sort of suggestion would you make as a manager if that's not good?

Mr. O'DELL. You know, it's not so much a matter of incentive to employees, I think, in a quasi-judicial environment. You're dealing as much as anything with presumptions.

And, quite clearly, when you have quasi-judges rewarded based upon productivity, with very, very little weight being given to the quality of the work, it certainly creates a perception within the veterans' community that may not be appropriate, but certainly one that must be dealt with.

It seems to me that there can be other management initiatives that can ensure productivity but that, again, the emphasis at all times for this Nation's veterans should be upon a quality decision.

Mr. McEWEN. I'm sure you've got a bag of those suggestions. We've eliminated one.

Mr. O'DELL. Sir?

Mr. McEWEN. I'm sure you have a series of suggestions that they could use as to how to reward their employees, and since we've removed pay as one, what do we do for those that are hard workers and have a commitment to serving the veterans efficiently and rapidly?

Should we give them desks with windows or what?

[Laughter.]

Mr. EGAN. If I could respond to that, Mr. McEwen, the Board of Veterans' Appeals has been given two separate exemptions from monetary incentives because it is a quasi-judicial operation.

These are not just bureaucratic automatons that need to be given carrots or sticks in order to get them to produce. These are people that, as you know, are professionals in the business of adjudicating.

This is the highest appellate operation within the agency. I don't think it's necessarily appropriate to compare the operations of the Board of Veterans' Appeals from a management or an administrative perspective with some factory type environment.

Mr. O'DELL. I think one other point on that, too. We were just discussing the need for additional staff. And, certainly, if the Board of Veterans' Appeals gets additional staff to augment the existing staff, the emphasis could then shift not so much for production, but more to quality.

And I agree very much with our legislative director. The need for quality is implicit, both in the work and in the trust that this nation's veterans have for the operation of the Board of Veterans' Appeals.

Mr. SCHULTZ. Mr. McEwen, just one comment I would like to make. I note that, in Public Law 100-687, they did take into consideration the incentives. And I think they made a stipulation in law that incentives available for Board members must take into account quality performance. That is in Public Law 100-687. And I just make that point.

Mr. BOLLINGER. I have nothing to add.

Mr. McEWEN. Do you want to jump in there?

Mr. BOLLINGER. Don't really have anything to add.

Mr. McEWEN. My only other question would be to the VVA. I, of course, remember the hearing last time very well in which the signature list was discussed and due note was made of that in your magazine, as was my participation in the questioning thereof.

My observation would be about the purloined regulations that they're discussing.

Have you raised any of those with the BVA?

Mr. EGAN. Well, first, purloined. Not exactly. The regulations were supplied to us.

Mr. McEWEN. Yes.

Did you discuss those concerns with them at all, or is this the first time?

Mr. EGAN. We haven't discussed those concerns with the BVA. We've only had those regulations for a limited period of time. And it's taken—

Mr. McEWEN. My question would be this, Paul. In his testimony, as Rick mentioned, he wanted to cast sunshine on the process. I think we need to encourage every suggestion and idea for an employee who dedicates his life to service to the veterans and VA has.

And if those at VA want to make contributions, suggestions and ideas for working papers that eventually can be considered, that's good, in my judgment. Now I might be totally wrong, and that's why I'm asking the question.

After they come to certain conclusions, then they have to publish it. Even at that point, they can't become law and/or regulations until such time as everybody has had full time for participation. Then they make changes or withdraw them or do whatever is done. In order to cast sunshine on the process, I think we should encourage them.

If someone is going to be allowed to be a thought policeman, roam the halls, capture the inter-office memos and nail the guy that had the idea we didn't agree with, I'm not sure that casts sunshine on the process. Now, of course, I could be all wrong. Fill me in.

Mr. EGAN. Well, we would have absolutely no objection to the idea of discussing these things with Chairman Eaton. However, I do suspect—and the Chairman is certainly here to respond to this—that, if we had given him a call and said we'd received this copy of these regulations, an April 24 version of them, we'd like to discuss them with you, I'm inclined to believe he would have said this is completely unofficial and that, therefore, there was nothing to discuss until such time as they were published in the Federal Register. Now, we're certainly not going to ignore something that's laid on our doorstep, especially when it deals with something that's this important.

It's not a question of here's the VVA over here serving as some sort of a hit squad, waiting until we can spring another one on the Board of Veterans' Appeals; that's not it at all. We take this business very, very seriously. The Board of Veterans' Appeals plays a key role in the justice, to the extent that it's provided, that's doled out to the veterans who are simply trying to take advantage of the benefits that are available to them.

Mr. McEWEN. Thank you. I appreciate that very much, all of you, your testimony and your commitment. It has been very, very helpful this morning.

Let me say that the record will be held open for any further answers that may wish to be made; as well, without objection, I'll include testimony from Mike Parker, who had to leave.

If there are no questions from the panel, I will consider this hearing adjourned.

[Whereupon, at 10:30 a.m., the hearing was adjourned.]

APPENDIX

Statement of Kenneth E. Eaton
Chairman, Board of Veterans Appeals
Department of Veterans Affairs
To the Subcommittee on Compensation,
Pension and Insurance
House Committee on Veterans' Affairs

June 14, 1989

Mr. Chairman, I am pleased to be here today at the oversight hearings on the operation of the Board of Veterans Appeals. As requested in your letter of May 18, 1989, I am here to report on the timeliness of the appeals process, quality of appeals, staffing needs and, of course, our preparation for judicial review of BVA decisions.

Perhaps the most significant event which has occurred since my last appearance before you has been the passage of Public Law 100-687, the Veterans' Judicial Review Act. With the passage of this act, the BVA has begun modifying existing procedures and developing new ones to reflect new legislative requirements and congressional intent. An intra-Department Working Group was organized to expedite the most pressing changes required by this legislation. This Working Group is composed of representatives from the Office of General Counsel, the BVA, the Veterans Benefits Administration, the Veterans Health Services and Research Administration, and the Office of Budget and Finance.

At the BVA, our attention was directed first to all of the administrative issues relating to Board policy, management and procedure. These consist of the Appeals Regulations, Rules of Practice, Field Appellate Manual (M1-1), BVA Appellate Procedure Manual (MBVA-1), VA Forms under BVA control, and Chairman's Numbered Memoranda. They were reviewed, and the process of revision began immediately following the passage of Pub. L. 100-687 last November.

Since the Travel Board program was affected almost immediately by the new legislation, with new requirements effective January 1, 1989, we amended M1-1 to establish a regional office program for notifying interested parties when a Travel Board hearing panel is coming and to carefully keep track of the chronology of hearing requests. The latter is especially important inasmuch as Pub. L. 100-687 requires that Travel Board hearings be scheduled in the order in which the requests for the hearings are received. We then revised VA Form 1-4107, the Notice of Procedural and Appellate Rights which is mailed to a claimant along with the notice of the field office determination, to expand the information as to representation and fee agreements and to inform the claimant that BVA decisions are appealable to the Court of Veterans Appeals (CVA). VA Form 1-9, the form used for filing a Substantive Appeal which is provided an appellant along with the Statement of the Case, was revised substantially to include information about Travel Board hearings, as well as additional information concerning judicial review, engaging the services of an attorney, and fee agreements. These are a few examples of the many projects which await us in updating manuals, forms and correspondence to conform with judicial review.

By far the major undertaking to date has involved the BVA Appeals Regulations and Rules of Practice. These regulations now include far more extensive information than was previously the case. Provisions of Pub. L. 100-687, including those pertaining to attorneys' and agents' fees, have been implemented. The Appeals Regulations and Rules of Practice have also been completely restructured, with an intentional division between Appeals Regulations and the Rules of Practice. The Appeals Regulations will comprise chiefly those instructions to VA personnel involved in the processing of appeals and the preparation of appellate decisions. The Rules of Practice are primarily oriented toward appellants and their representatives and, of course, outline all of the procedures necessary to obtain a BVA decision. At this time, the proposed Rules of Practice and Appeals Regulations are nearly ready for publication in the Federal Register. We anticipate a number of comments and plan to have them adopted in final form by the time that the CVA is scheduled to begin operations.

The BVA has already received numerous appeals susceptible to judicial review. These appeals, as you know, arise from a Notice of Disagreement filed on or after November 18, 1988. We now have the first decisions resulting from those appeals ready for dispatch. At this time there is no available address for the CVA. We will be notifying these appellants of their appeal rights to the court, but informing them that there is no address available as yet for filing an appeal. We are keeping track of all of these appeals in our computer and as soon as we receive information which may assist these individuals in filing an appeal we will endeavor to notify them. We have a special category of appeals comprising insurance matters in which it is uncertain whether the appeal rights of the appellant lie with the United States District Courts or the CVA. Until we have clarification as to which court has jurisdiction over these cases, we will continue to inform the appellants of their right to file an action in district court. If we find that these individuals have the right to appeal to the CVA, we will so notify them.

We also have been working very closely with the General Counsel's Office with respect to the role that the BVA will play in the litigation of these decisions in the CVA. We have been fortunate in having had the opportunity to meet with Mr. Alexander Stevas, whom Chief Judge Frank Q. Nebeker has asked to assist in the administrative establishment of the new court. We anticipate that the BVA will be very active in certifying the appellate record for the court and in furnishing litigation support to the General Counsel's office, including obtaining documentation, performing background research, and providing statistical data. We will also monitor remand decisions from the CVA, oversee the completion of any action mandated by that court, and make whatever policy changes are necessary. We have sketched out an organization which, if necessary, can be staffed with existing Board attorneys to form a litigation support unit to meet the demands of judicial review.

It is difficult at this point in time to foresee the exact impact of judicial review on the BVA and its personnel. However, I have made a strong commitment to involve key members of my staff in order to plan and establish procedures as quickly as possible. In so doing, I hope we can carry out effectively our obligations under the law and remain flexible in devising solutions to problems as they arise in this new arena.

While we have been concentrating much of our recent attention on implementing the requirements of Pub. L. 100-687, our normal appellate workload has continued to be heavy. We currently have over 19,000 active cases on our appellate docket, which for the past several years has averaged between 13,000 and 15,000 active cases. This growth in our docket reflects the current relationship between our decision production capacity and the rate of appeal receipts at the Board. We have been receiving more appeals over the past two years than we are capable of deciding. Consequently, our docket continues to grow, and our projected response times continue to grow, as well. Table 1 provided with this prepared statement summarizes some of our most relevant production-related statistics over the past several years.

The Board produced a total of 41,607 appellate decisions during Fiscal Year 1988, and our average elapsed BVA processing time for appeals was 136 days. We consider this average processing time to be quite respectable, particularly in view of some of the changes that we instituted in our Professional Service operations over the past year. We are devoting more time and resources to our quality review processes now than we have in the past. In a similar vein, we have enlarged the standard review requirements for the average BVA decision by strengthening the longstanding Board policy that all decisions receive a full review. To insure that all decisions receive a full three Board Member review, we have assigned senior attorneys as Acting Board Members when there is an absence of one of the Board Members in a Section. During the period that preceded the passage of Pub. L. 100-687, many longstanding BVA practices were subjected to close examination. We believe that our record stood up well under this scrutiny. At the same time, we feel those changes that we have made in our Professional Service practices as a result of these reviews have improved the caliber of decisions at the Board and will serve us well under a judicial review environment.

One of the costs associated with our quality improvements to the Board's decision processes is a dilution of our productivity level. The added staff attorney and Board Member time spent on case reviews and our quality review process do increase the average time requirements for decisions. These expanded time requirements combined with relatively high levels of appeal receipts are causing a rise in our response time. Our computations of BVA response time on appeals have proven to be reasonably accurate indicators of our expected average processing times. Given our current staffing picture, we have projected that our response time will have risen somewhat by the end of this fiscal year. I am not pleased with this response time trend, and we will continue to do our best to ensure that our response time is kept as low as practicable.

Our current staffing level is approximately 410 FTEE. Under present circumstances, we expect our staffing level to be approximately 400 FTEE as of the end of the current fiscal year. With the CVA scheduled to begin operations on September 1, 1989, we expect to see the initial BVA workload relative to CVA filings begin to materialize about the start of FY 1990. Staffing will be required to perform the BVA court-related activities mentioned earlier in this statement, and it appears that whatever level of staffing is actually needed to fulfill these work requirements must come from our current resources.

In your letter of May 18, 1989, you also expressed your interest in reviewing the quality of the appeals function at both the field level and BVA level. We have no simple quantitative measures of the effectiveness of our quality review program. Response time, rates of allowances, remands and denials, and costs per case are some of the many different ways we use to measure various quantitative aspects of our appellate program operations. A similarly straightforward approach to measuring quality and changes in quality is far more elusive. Nonetheless, I have been convinced for some time that the quality of our appellate decisions has been constantly improving, and the feedback that I continue to receive from the veterans service organizations, congressional offices and elsewhere lends support to this conclusion.

Earlier this year, we were provided with study findings by a management consulting firm, Abt Associates Inc., that has been involved in an evaluation of the CHAMPUS appeals process. The VA's appellate system was one of five government appeals programs that were reviewed by this firm in the early stages of their analysis to develop some comparative data for use in their evaluations. There were as many significant differences among these various appeals programs as there were similarities, and therefore, any program comparisons must be made with a great deal of caution. The findings that we were provided did not attempt to comparatively evaluate the reviewed programs nor were any value judgments made regarding program quality or effectiveness. Given these precautions, we did find the comparisons of some of the summary characteristics of these programs to be very interesting.

The complexity of the VA's benefits program was the highest of any of the five appellate programs evaluated in this study. The VA had the highest rate of initial appeals, but the VA adjudicative decisions had the lowest rate of reversal on appeal of any of the five evaluated programs. One point that we felt was significant was that the BVA appeals process entailed a significantly greater level of professional time input to each appellate decision than any of the other programs at the first level of agency appeal. We believe that this fact reflects the emphasis we place on ensuring high standards of quality and professionalism in our appellate decisions at the Board. Despite the high level of professional time involved in each decision, the BVA's unit cost per decision was in the mid-range of the five programs. Although the VA appellate program was not the focal point of these analyses, we feel that the relevant findings of this study reflect favorably on both the VA's adjudication and appellate programs.

Mr. Chairman, this completes my prepared statement. I will be happy to answer any questions that you may have.

TABLE 1 APPEALS STATISTICAL DATA - BOARD OF VETERANS APPEALS

	FY 1984	FY 1985	FY 1986	FY 1987	FY 1988	1st Half FY 1989
FIELD WORKLOAD DATA						
Appeals Filed (NODs)	61328	63045	63850	63570	67089	35265 *
Dispositions	64261	67534	60677	62487	65603	35941 *
% Allowed	12.7%	12.4%	12.5%	12.5%	**	**
% Closed	21.7%	26.4%	22.0%	22.0%	**	**
% Withdrawn (& Other)	10.2%	10.4%	10.5%	10.5%	**	**
% Certified to BVA	55.4%	50.8%	55.0%	55.0%	**	**
Pending - End of Period	46818	44145	45737	46625	48111	47435 *
BVA WORKLOAD DATA						
Receipts	43811	43457	43584	41491	43792	20071
Dispositions	44064	45273	42003	41296	41607	18215
% Allowed	13.8%	13.3%	12.8%	12.8%	13.5%	14.4%
% Remanded	14.9%	16.3%	18.8%	20.7%	19.3%	21.5%
% Withdrawn (& Other)	0.9%	1.1%	1.3%	1.4%	1.1%	0.7%
% Denied	70.3%	69.3%	67.2%	65.1%	66.0%	63.4%
Pending - End of Period	14497	12681	14262	14457	16642	18498
Benefits Granted by AOJ	1376	1779	1730	1781	1665	1107
Benefits as a % of Remands	20.9%	24.1%	21.9%	20.8%	20.7%	28.3%
Formal VACO Hearings	1191	1231	1139	1192	1265	680
Travel Board Hearings	708	645	645	665	641	343
Offices Visited	50	48	48	51	52	29
Categories of Appeals						
Disability Compensation	76.3%	75.7%	75.2%	75.7%	76.9%	76.4%
Disability Pension	7.1%	6.9%	6.5%	6.1%	5.8%	5.9%
Medical	1.6%	1.7%	1.6%	1.3%	1.3%	1.3%
Insurance	0.3%	0.3%	0.3%	0.2%	0.2%	0.2%
Death	6.0%	6.1%	6.1%	6.1%	5.8%	5.9%
Training	2.2%	1.8%	1.8%	1.4%	1.3%	1.2%
Waiver	4.5%	5.3%	5.4%	5.2%	4.6%	4.3%
Loan Guaranty	0.7%	0.9%	1.7%	2.3%	2.3%	3.6%
Reconsiderations	0.6%	0.7%	0.7%	0.7%	0.7%	0.6%
Character of Discharge	0.2%	0.2%	0.2%	0.2%	0.2%	0.2%
Processing Time (Days)						
NOD to SOC	50	51	54	54	56	59
SOC to SA	53	54	55	57	59	59
SA to Certification	210	180	183	172	168	172
Certification to Callup	15	15	0	0	0	0
Callup to BVA Decision	117	114	106	130	136	166
Pending - End of Period	61315	56826	59999	61082	64733	65933
Field: NODs	22236	20707	25448	25949	26425	25037
Subs. Appeals	24582	23438	20289	20676	21686	22398
BVA: Subs. Appeals	14497	12681	14262	14457	16642	18498

* Field appeals workload data estimated subsequent to FY 1986

** Insufficient data available for computation or estimation purposes.

AOJ = Agency of Original Jurisdiction; VACO = VA Central Office; SA = Substantive Appeal

NOD = Notice of Disagreement; SOC = Statement of the Case

STATEMENT BEFORE THE
SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
COMMITTEE ON VETERANS' AFFAIRS, U. S. HOUSE OF REPRESENTATIVES

BY

JOHN W. (BILL) ROLEN, LEGISLATIVE COMMITTEE
AMERICAN EX-PRISONERS OF WAR

WITH RESPECT TO
OVERSIGHT HEARINGS ON THE OPERATION OF THE
BOARD OF VETERANS APPEALS

WASHINGTON, DC

JUNE 14, 1989

PREPARED BY:
CHARLES M. WILLIAMS
EXECUTIVE DIRECTOR

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE COMMITTEE:

ON BEHALF OF THE 30,000 MEMBERS OF THE AMERICAN EX-PRISONERS OF WAR, AND THE 75,000 FORMER PRISONERS OF WAR THAT WE REPRESENT, I WANT TO ASSURE YOU THAT THE QUALITY AND THE TIMELINESS OF SERVICE PROVIDED BY THE BOARD OF VETERANS APPEALS ARE NOT ONLY OF VITAL CONCERNS TO FORMER PRISONERS OF WAR AND YOUR COMMITTEE, BUT MUST ALSO BE TO THE BOARD OF VETERANS APPEALS.

MANY OF THE PROBLEMS THAT WE WERE WELL AWARE OF, PRIOR TO PL 97-37 BECOMING LAW, ARE STILL WITH THE EX-POWS, ALTHOUGH GENTLEMEN, YOU HAVE PASSED 15 PRESUMPTIVES FOR THE POW SO THAT SERVICE CONNECTION COULD BE ESTABLISHED. THE VA'S OWN STUDY OF POWS IN 1980 DOCUMENTED THAT LONG TERM HEALTH CONSEQUENCES WOULD FREQUENTLY OCCUR AND THAT POWS INVARIABLY LACKED ADEQUATE SERVICE RECORDS CONCERNING INJURIES AND ILLNESSES SUFFERED DURING CONFINEMENT.

THE PRACTICAL PROBLEMS OF POWS OBTAINING FAIR AND EQUITABLE RESOLUTION OF THEIR LEGITIMATE CLAIMS WERE RECOGNIZED BY CONGRESS WHICH SOUGHT THEN, AND VIA LATER LEGISLATION, TO CORRECT WITH PRESUMPTIVES. THE VA POW ADVISORY COMMITTEE ESTABLISHED BY THAT LEGISLATION HAS REPEATEDLY AFFIRMED THAT THE ADJUDICATION PROCEDURE, AS IMPLEMENTED, IS NOT EFFECTIVE FOR MANY DESERVING POWS. THE SAD PART OF ALL THIS IS THAT THE PRESUMPTIVES THAT WE SOUGHT, AND THAT YOU PASSED INTO LAW TO AID US ARE SIMPLY NOT WORKING.

ADJUDICATORS, LACKING FIRM DIRECTIVES ON PRESUMPTIVES, MAKE FLAWED RATINGS, AND THIS IS COMPOUNDED BY BVA WHEN IT DENIES AN APPEAL TO CORRECT A FLAWED INITIAL RATING.

THE VA HAS CONTINUED TO INSIST THAT THESE ADDITIONS TO THE PRESUMPTIVE LIST THAT WE HAVE WORKED TO GAIN FOR OUR FELLOW POWS ARE "UNNECESSARY", THAT THESE CONDITIONS ARE ALREADY BEING GRANTED ON A DIRECT BASIS UPON REVIEW OF "AVAILABLE" MEDICAL EVIDENCE. MR. VOGEL, CHIEF BENEFITS DIRECTOR, SO TESTIFIED AS LATE AS JUNE 30, 1987, BEFORE THE SENATE COMMITTEE ON VETERANS AFFAIRS, AS HAVE HIS PREDECESSORS AT EVERY OPPORTUNITY.

GENTLEMEN, OVER 40 YEARS AGO THE MAJORITY OF THE RETURNED POWS BECAME DISENCHANTED WITH THE VA. THE WORD WAS THAT IT WAS PROVIDING SECOND RATE MEDICAL CARE WITH A BELLIGERENT ATTITUDE, AND VETERANS BY THE THOUSANDS STAYED AWAY. MEDICAL EVIDENCE THAT EXISTS IS OF A RECENT TIME-FRAME, AND NOT USABLE TO ESTABLISH SERVICE CONNECTION. THAT PLUS THE FACT THAT MEDICAL RECORDS, IF ANY, FROM ENEMY FILES ARE SIMPLY NOT AVAILABLE, THE PRESUMPTIVE IS NECESSARY. IT IS THE ONLY WAY WE ARE ABLE TO ESTABLISH SERVICE CONNECTION.

SINCE 1972, THE VA HAS INDICATED BURDEN OF PROOF TO BE WITH THE VA. THIS WAS AND IS TO ASSURE FORMER POWS FAIR AND EQUITABLE RESOLUTION OF THEIR CLAIMS WHERE HISTORY HAS SHOWN RECORDS TO BE INADEQUATE, AND IN MOST CASES, TOTALLY LACKING. IT HAS BEEN STATED THAT MERE SUSPICION OR DOUBT IS NOT A JUSTIFIABLE BASIS FOR DENYING A CLAIM.

YET ADJUDICATORS REPEATEDLY TELL OUR NATIONAL SERVICE OFFICERS THAT THEY CANNOT APPLY THESE CONCEPTS WITHOUT MORE EXPLICIT INSTRUCTIONS FROM CENTRAL OFFICE.

THERE IS A PERVASIVE ATTITUDE THAT MOST NEW CLAIMS OF POWS ARE UNWARRANTED, EVEN EXPLOITIVE, WHICH ADVERSELY AFFECTS THE QUALITY AND TIMELINESS OF VA SERVICES TO FORMER PRISONERS OF WAR AT ALL LEVELS.

THE ADDITION OF A HEARING OFFICER AND THE NEW VETERANS COURT SHOULD, WITHOUT DOUBT, IMPROVE THE CHANCE OF THE VETERAN RECEIVING A FAIR EVALUATION, AND THAT GENTLEMEN IS THE PROBLEM!! THE VETERANS ADMINISTRATION AND ITS SUCCESSOR, THE DEPARTMENT OF VETERANS AFFAIRS WAS AND IS INTENDED TO BE A FRIEND OF THE VETERAN, WHOSE SOLE PURPOSE IN LIFE IS TO ASSIST THE VETERAN, AND TO SERVICE CONNECT IF POSSIBLE. ATTEMPTS TO FIND WAYS NOT TO DO THIS IS BOTH COUNTER-PRODUCTIVE AND IN OPPOSITION TO ITS INTENDED PURPOSE.

THE AMERICAN EX-PRISONERS OF WAR APPRECIATE THIS OPPORTUNITY TO APPEAR BEFORE YOU TODAY. THANK YOU.



Statement of
The American Legion

1608 K STREET, N. W.
WASHINGTON, D. C. 20006

by

PHILIP R. MILKERSON, ASSISTANT DIRECTOR
NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION
THE AMERICAN LEGION

before the

SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
COMMITTEE ON VETERANS AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

BOARD ON VETERANS APPEALS

JUNE 14, 1989

STATEMENT OF PHILIP R. WILKERSON, ASSISTANT DIRECTOR
NATIONAL VETERANS AFFAIRS AND REHABILITATION COMMISSION
THE AMERICAN LEGION
BEFORE THE SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
COMMITTEE ON VETERANS AFFAIRS
U.S. HOUSE OF REPRESENTATIVES
JUNE 14, 1989

Mr. Chairman and Members of the Subcommittee:

The American Legion appreciates this opportunity to offer comment on the current operations of the Board of Veterans Appeals, as well as actions by the Department of Veterans Affairs to implement the provisions of Public Law 100-687 and procedures relating to the Court of Veterans Appeals.

The enactment of Public Law 100-687, the "Veterans' Judicial Review Act", we believe will have a profound and salutary effect on the adjudication and appellate process of the Department of Veterans Affairs. This statute, in addition to establishing the Court of Veterans Appeals, provided for a number of specific improvements in VA's due process procedure in benefit claims and in the operation of the Board of Veterans Appeals. However, to date, regulations implementing this law both with respect to the Department of Veterans Affairs and the Court of Veterans Appeals have yet to be promulgated. We understand the Department is in the process of developing the required regulations, many of which are contingent upon rules and regulations to be issued by the Court of Veterans Appeals. The American Legion, in concert with the other major veterans service organizations and the American Bar Association, is working to develop certain preliminary rules for the Court of Veterans Appeals. The time table for the promulgation of the Court's regulations is not clear at the present time.

In summary, there are many complex questions and issues associated with this landmark legislation. Development of the implementing rules and regulations will of necessity be a slow and time consuming process. In our view, it is still too early to offer specific comment on how the Department and the Court of Veterans Appeals will handle cases, under the new law.

Despite the lack of final regulations, we would like to discuss several concerns which The American Legion has previously voiced with respect to assuring full due process and the full and fair consideration of cases before the Board of Veterans Appeals.

One of the many changes provided by Public Law 100-687 was the redefinition and codification of the doctrine of reasonable doubt into section 3007 of title 38, United States Code. Previously, this provision was defined only in a VA regulation. The "new" definition, in our judgment, does not add particular clarity or status to this essential factor in the adjudication of certain benefit claims. We are strongly supportive of the

effort to improve the decision-making process by eliminating to the maximum extent possible, the problem of misunderstanding and confusion frequently existing among VA adjudicators, members of the Board of Veterans Appeals, and claimants as to what constitutes reasonable doubt and when this provision should be applied in the final determination on a benefit claim. Regulations addressing this issue, however, have not as yet been released. Such regulations, when finally developed, must clearly define this doctrine and the circumstances for its application in terms understandable to VA adjudication personnel and claimants alike. In the course of representing thousands of veterans over the years, the question of whether or not they have, in fact, received the benefit of the doubt has been the basis of many appeals. It will, in all probability, figure prominently in many cases which may be considered by the Court of Veterans Appeals.

Also codified in title 38 was the provision for obtaining an advisory opinion from an independent medical expert at any stage of a benefit claim. Previously, the regulations limited such requests to the Board of Veterans Appeals. We believe access to expert medical opinion at the regional office level is a valuable resource and most important to the development of complex medical claims, if properly and judiciously used. Additionally, both the regional office and Board of Veterans Appeals may request advisory medical opinions from the Chief Medical Director. However, we have found this is seldom done at the regional office level. We believe the as yet unreleased regulations implementing this provision of the law should emphasize both the availability of such expert medical opinion and the necessity of this type of development, where appropriate.

Another important change was the addition of section 4010 to the title which provided that claimants may request a hearing before a traveling section of the Board of Veterans Appeals. Previously, very limited information was disseminated by the Board of Veterans Appeals concerning access to the traveling sections of the Board and the opportunity for a personal hearing at a regional office in the claimant's home state. While we recognize the limited amount of time and resources which the Board of Appeals may be able to devote to this program, it, nonetheless, represents an essential part of the Board of Appeals' responsibility to claimants. The regulations, when promulgated, should describe precisely how this program will function with the overall goal in mind of improving appellant's access to the Board of Veterans Appeals.

In the interim, the Board of Veterans Appeals is in the process of revising VA Form 1-9, Appeal to Board of Veterans Appeals, which will provide added detailed

information and instructions relative to requests for personal hearings, preparation of the substantive appeal, attorney representation, and the Court of Veterans Appeals. We would encourage the Board of Appeals to complete action on this revision at the earliest possible date. At the time of its release, we believe it should be disseminated to those individuals with pending appeals.

Although not a part of Public Law 100-687, the Hearing Officer program, implemented by the Department of Veterans Affairs pursuant to the consent decree in the Semenchuk v. Turnage case, has substantially improved the intermediate level of adjudication of benefit claims. Claimants may now, in the course of contesting a disallowance of a claim, request and receive a personal hearing before an impartial Hearing Officer who is empowered to take any necessary adjudicative action to reverse, amend, or confirm the action of a local rating board. Based on previous hearings before the local rating board, many claimants felt their only resource was to the Board of Appeals for corrective action. The results of the first six months of the program indicate that many issues can be successfully and favorably resolved through the Hearing Officer. Alternatively, such hearings help ensure the inclusion of information and evidence the claimant deems important to the eventual consideration of the case by the Board of Veterans Appeals, and possibly the Court of Veterans Appeals.

Mr. Chairman, with respect to the current operation of the Board of Veterans Appeals, The American Legion has voiced its concern over a number of problems relating to the "quality" of appellate decisions both at the regional office level and by the Board of Veterans Appeals. We will, therefore, limit our comments today to issues relating to the current remand rate and the expertise of members of the Board, in particular the medical members.

In regard to the remand rate, over the last four years there has been a sustained increase in the percentage of appeals which have been remanded back to the office of original jurisdiction for additional evidentiary development, including physical or psychiatric examinations, and to accord the claimants full due process. The remand rate has risen from 16.3 percent in FY 1985 to 21.5 percent as of the second quarter of FY 1989. It should be noted that in the three years preceding 1985, the remand rate had been gradually declining. It is also noteworthy that approximately 20 percent of those cases remanded are granted by the regional office following the required development action. In the view of The American Legion, the steady rise to more than one in five

appeal cases has been due in large part to the erosion of the quality of decisions being rendered at the regional office level. One of the primary factors contributing to the declining quality has been the persistent and consistent personnel cuts affecting the adjudication division at most stations. The loss of scores of trained, experienced, and productive personnel through retirement and attrition without replacement has led to increasing backlogs in the processing of claims. Because of the lower level of experience and training among the remaining workforce, the overall quality of the decisions being rendered on benefit claims had markedly declined, as reflected in increasing error rates and processing times reported by the Veterans Benefits Administration.

In addition to a rise in the percentage of cases remanded by the Board of Veterans Appeals, there has been a small but significant rise in the percentage of cases being allowed by the Board. In FY 1986 and 1987, the allowance rate stood at 12.8 percent. In FY 1988, it was 13.5 percent and as of the second quarter of FY 1989, it is 14.4 percent.

In the opinion of The American Legion, while these statistics reflect favorable action, they strongly suggest that in too many instances claimants were forced into lengthy unnecessary appeals, due to lack of essential development of information or evidence, including appropriate examinations, and erroneous decisions. The problem of the development of evidence at the regional office level has been discussed with our service officers, many of whom expressed recurrent complaints of cases being denied rather than undertaking what was later shown to be necessary development. In certain instances, the reason (provided informally) was that "they" (the regional office) could not grant the particular issue as it appeared to be too controversial or complex, but the Board of Appeals could. Similarly, there has been an extreme reluctance on the part of the regional office to seek advisory medical opinions from the local VA medical center or the Chief Medical Director or advisory technical opinions from the Compensation and Pension Service at VA Central Office in order to resolve a particular medical or technical question. It is an attempt to shift the total burden of proof for the claim to the claimant. This rationale is unacceptable to The American Legion. In our view, appropriate medical and technical resources are available to the regional offices and the Board of Veterans Appeals within the Department. Additionally, statutory authority now exists to seek independent medical expert opinions. It is noteworthy that new section 3007 of title 38 affirmatively states "the Administrator (Secretary) shall assist such claimants in the development of facts pertinent to the claim." This also includes



obtaining information from other Federal agencies.

As indicated previously, the regulations implementing PL 100-687 have yet to be promulgated. It is hoped these will clearly define the intent and scope of this legislation to the benefit of all claimants.

In our view, the reported increases in both the allowance and remand rates by the Board of Veterans Appeals reflect more than a difference of opinion between the regional office and the Board. In those cases returned to the regional office for further required development and readjudication, benefits have been granted in 21 percent of the claims. This highlights the fact that far too many claims have been denied either in error or without having been fully developed. Such denials by the regional office has, in effect, contributed to an increased workload at the Board of Appeals. In this respect, we note the Veterans Benefits Administration is in the process of establishing an adjudication academy to provide intensive formal training for adjudication personnel. We believe over a period of time this will help improve the quality of adjudication at the regional office level which may in turn impact the number of appeals taken by dissatisfied claimants.

With respect to the issue of the "quality" of decisions by the Board of Veterans Appeals, we believe there is a general sensitivity to due process and fairness. However, we remain concerned by other factors which ultimately affect both the allowance and remand rates, in particular the medical expertise and training of medical members of the various Board sections, and the jurisdictional specialties of the Board section to which they may be assigned. Current staffing at the Board includes only one specialist in psychiatry. This means that cases involving an issue of psychiatric disability such as PTSD are often decided by individuals with little or no training or clinical experience in the field of psychiatry.

In our view, the question of qualification becomes a critical issue in the reconciliation of findings and diagnoses contained in the record. The physician assigned to a section may well be less qualified medically than the psychiatrists or psychologists, or medical specialists who have actually examined, diagnosed, or treated the veteran. A similar concern exists with regard to the consideration of other types of disabilities.

It is noted, however, that the Board of Veterans Appeals has made an effort to hire and assign physicians with certain specialties. Some examples include a specialist in internal medicine and hematology to consider AIDS cases, a specialist in radiology to

handle radiation exposure claims, a specialist in pulmonary medicine to consider asbestos exposure cases, and a specialist in thoracic and vascular surgery to handle gunshot wound cases.

In summary, the Board of Veterans Appeals must be able to assure veterans and other appellants that their claims will receive full and fair consideration in a timely manner. Although further recourse now exists to the Court of Veterans Appeals, this process will involve additional time and expense for the individual. The American Legion would much rather see necessary improvements in the basic adjudication of claims with added emphasis on continuing education and training at both the regional office level and for all members of the Board of Veterans Appeals.

Mr. Chairman, that concludes our statement.

STATEMENT OF
 ROBERT MANHAN, SPECIAL ASSISTANT
 NATIONAL LEGISLATIVE SERVICE
 VETERANS OF FOREIGN WARS OF THE UNITED STATES

BEFORE THE
 SUBCOMMITTEE ON COMPENSATION, PENSION AND INSURANCE
 COMMITTEE ON VETERANS' AFFAIRS
 UNITED STATES HOUSE OF REPRESENTATIVES

WITH RESPECT TO

THE OPERATION OF THE BOARD OF VETERANS APPEALS

WASHINGTON, D. C.

JUNE 14, 1989

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the privilege and opportunity to appear before this distinguished body on behalf of our 2.9 million members of the Veterans of Foreign Wars of the United States and its Ladies Auxiliary. As the Subcommittee well know the VFW has consistently worked long and hard to ensure all veterans have the opportunity to participate in a timely and equitable appellate system. One that would start with the Department of Veterans Affairs Board of Veterans Appeals (BVA) and end with the United States Supreme Court. With the enactment of Public Law (P.L.) 100-687, entitled "Veterans' Judicial Review and Benefits Improvement Act", this is now a reality.

Historically, the BVA was established in 1933 and was empowered to review Regional Office (RO) decisions dealing with compensation or pension benefits, education benefits, waiver of recovery of overpayments, and reimbursement of unauthorized medical services. At the present time, BVA totals 417 personnel. The heart of this organization is the Hearing Board. Currently, there are 21 boards each composed of three voting members—two attorneys and one physician. The remaining personnel are involved in providing all necessary administrative, research and review tasks to ensure that a beneficiary claimant receives the fairest possible decision which incorporates any and all elements of reasonable doubt in his/her favor as soon as possible.

During the first half of Fiscal Year (FY) 1989, that is from 1 October 1988 to 31 March 1989, the BVA has completed approximately 18,000 cases and has about another 20,000 cases still waiting to be heard. Based on a straight-line projection of workload, it is reasonable to expect BVA to continue to experience an increased total workload of cases by the end of this fiscal year. Note that in FY 1987, BVA received 41,000 cases and in FY 1988 almost 44,000 cases. It is also interesting to note BVA granted the benefit(s) being sought in 12.8 percent of the cases in FY 1987; 13.5 percent in FY 1988 and in 14.4 percent of the cases for the first 6 months of this current period.

Using the above-mentioned facts as background material, it will be our pleasure to immediately address the questions posed for this oversight hearing. The first deals with the issue of timeliness in the appeals process. Unfortunately, BVA has increased its own in-house processing time from "call up" to BVA decision to five and one-half months or 166 days for the first half of FY 1989. For all of last year, the BVA used about four and one-half months or 136 days. The VFW firmly believes the response time will continue to increase this year for the following four reasons. First, BVA has and will continue to experience personnel staff reductions as a direct effect of budget reductions. In FY 1987, the BVA workforce was 440 persons, as previously mentioned. This year it is 417 people with the FY 1990 figure to be 403 persons. As a rough rule of work measurement, each BVA full-time employee (FTEE) processes 100 cases per work year. Hence, the present reduction mechanically accounts for a backlog of almost 1,150 cases through March 1989. The second factor is the Chairman's policy decision to place added emphasis on quality control. The VFW agrees that it is far better to

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take the necessary extra time at the Board to ensure that each and every claimant receives a proper and equitable decision accompanied by a complete and easy to understand statement explaining how and why the Board reached its decision based on the available facts and testimony. The alternative is to use a "cookie cutter" approach to standardize cases by categories of benefits being sought, and measure effectiveness by how soon a case is processed. The results would be a more timely but, more often, improper or inequitable decision. And, with the advent of judicial review, which we will address in more detail later, there is a BVA need to immediately devote greater attention to each case. Third to be considered is the BVA statistical report that shows there are almost 22,400 pending appeals being processed at all the 58 ROs for the first half of this fiscal year. A great number of these cases will reach BVA within the next six months. For all of FY 1988, there was a grand total of almost 21,700 pending appeals. Therefore, it is fair to assume the total BVA FY 1989 workload will be greater than it was last year. The fourth and final point, further complicating the immediate question of BVA timeliness is the May 1989 U.S. Federal District Court decision requiring VA to rewrite regulations governing claims for disability compensation relating to Agent Orange exposure. This means about 34,000 claims filed by Vietnam veterans exposed to the herbicide will be re-opened. Those Agent Orange appeal cases at BVA have already been returned to their respective ROs because in October the VA is expected to issue new guidelines regarding standards of evidence requiring veterans to prove only a significant correlation between their exposure to Agent Orange rather than a direct cause-and-effect relationship. The bulk of these cases deal with veterans whose cases were denied years ago and were never appealed. Once the new regulations are in place, the ROs will review all past decisions which were affected by the original rules and all veterans will be notified of the outcome of this review, even if there is no change in the original decision on the claim. The key point being made is that the potential Agent Orange appeal cases will come at a time when BVA already faces a backlog in claims and a further reduction of 14 staff members to 403 in FY 1990, which begins in October 1989.

The second issue addressed by this Subcommittee deals with the quality of the appeals function at both the field level and BVA level. As the members of this Subcommittee will recall, I had the opportunity to submit a written statement and provide oral testimony before this body on May 9, 1989, regarding the performance of the Veterans Benefits Administration (VBA) Regional Office adjudication activity as it affects timeliness and the quality of processing claims. Therefore, I shall limit this response to the RO cases acted upon by the BVA for the first half of this year. The VFW firmly believes the overall quality of individual case decisions has improved based on the BVA's disposition of cases through March 1989. About 2,600 cases or 14 percent of the total decisions rendered granted all or at least some of the benefits being sought. Another 3,900 cases, or almost 22 percent were returned to respective ROs for further development; i.e., the case was remanded. It is very interesting to note that of all these remanded cases, some 1,107 or 28 percent were subsequently approved or allowed at regional level for some or all benefits being sought. This is referred to as a "field allowance". It is also a matter of great pride that the VFW had a 36 percent field allowance rate that involved some 97 of the VFW remanded cases. However, the BVA has confirmed the original RO denials in 11,500 cases for 63 percent. By way of rough comparison, we note that in FY 1986, the BVA confirmed the RO decisions 67 percent of the time; in FY 1987, it dropped to 65 percent and for all of FY 1988, the figure was 66 percent. At this point in time, the VFW will not attempt to predict what the final FY 1989 denial rate will be. We are, however, very satisfied with the emphasis being placed on quality control for all the reasons previously discussed.

Another gauge of quality control on cases coming from the ROs can be measured by the total number of times the BVA must seek outside technical or specialized medical assistance or guidance. Specifically, in all of FY 1988, BVA requested 115 different Independent Medical Expert (IME) opinions. IMEs

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are used to resolve the element of doubt whenever a case file contains conflicting medical opinions, conclusions or evidence. For the first half of this fiscal year, less than one-third or 37 IMEs have been requested. The same general trend is noted in requests from the Armed Forces Institute of Pathology (AFIP) when in FY 1988, there were 25 requests, this year there have been only six requests. AFIP requests most often involve cases where tissue samples are key pieces of medical evidence. Cancer and cause-of-death claims sometime require this outside service. And a very special measurement of BVA's own quality of past decisions rendered can be determined from their own reconsideration statistics. Briefly stated a reconsideration is initiated by the beneficiary claimant on a previously rendered BVA decision. The claimant or his/her representative must point out there was/is an error in fact or law. There is no required time limit on when these types of claims may be submitted. In all of FY 1988, BVA received 287 reconsideration requests and recognized the fact they had indeed been wrong in 37 cases for a 13 percent error rate. For the first 6 months of this year, BVA has processed 118 reconsideration cases and recognized a previous error in 13 cases for an 11 percent error rate. Collectively, these figures indicate to the VFW that the BVA chairman's decision to emphasize quality over quantity was the right one, despite an increase in the workload and a reduction in the workforce.

The third question asked by this Subcommittee deals with the staffing needs at the BVA. As previously mentioned in FY 1987, the BVA had a 440-person workforce. By FY 1990 it will be reduced about 8 percent to 403 people. And we have also mentioned the fact that the routine appellate case load shows a slight increase and Agent Orange cases should be coming on-line sometime in FY 1990. But the BVA is also now faced with the internal additional requirement to interface and comply with the still unknown requirements of the Court of Veterans Appeal (COVA). At this time, Mr. Eaton, Chairman of BVA, is developing plans and procedures necessary to operate under the new judicial review environment. We believe there will ultimately be a new requirement for 15 to 20 persons to be organized into a "judicial review" section or team dedicated to meeting the requirements of P.L. 100-687. There will also be a new requirement to store approximately 10,000 to 15,000 cases heard by BVA for the 120-days period of time required by law to allow claimants who are dissatisfied with the BVA decision to appeal their case to COVA which will also be located here in Washington, D. C. Based on just this outline of an anticipated increase in Agent Orange case workload and the new mandated COVA requirements, BVA should consider a FY 1990 FTEE of at least 460 rather than the projected figure of 403. The VFW believes that to authorize anything less than these 57 new spaces at this time would be pennywise and pound foolish.

The Subcommittee's last question deals with actions being taken to implement the provisions of P.L. 100-687 regarding judicial review of veterans claims and the establishment of procedures to deal with the new Court of Veterans Appeals (COVA). By way of common background, the VFW wishes to briefly outline just what the law established when on November 18, 1988, the President signed S. 11 into P.L. 100-687, the "Veterans' Judicial Review and Benefits Improvement Act". This act established a COVA where claimants for veterans benefits may seek relief from adverse BVA decisions. The new court, composed of a chief judge and at least two but not more than six associate judges, will be located in the District of Columbia, but is authorized to meet anywhere in the country. The COVA will have exclusive jurisdiction to review decisions of the BVA. It may affirm, modify, or reverse a decision or remand the matter. Any person adversely affected by a decision of the BVA on an appeal filed on or after November 18, 1988, may file a notice of appeal with the court within 120 days of receipt of the final decision. In reviewing a BVA decision, the court will rely on the record as it was developed before the Administrator and the BVA. The COVA may not review the Schedule of Rating Disabilities, however. The COVA will establish its own rules and may allow non-lawyers to appear before it. The usual court powers, such as the ability to issue subpoenas and to punish for contempt, belong to this court. The VA will be represented before the COVA by the VA General Counsel but may not appeal to the court.

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Review of decisions by the COVA may be sought in the Court of Appeals for the Federal Circuit. That court also has the power to decide all relevant questions of law, including interpreting constitutional and statutory provisions. Decisions of this court are final except that certiorari may be had to the Supreme Court.

At this point in time, the VFW is very satisfied with the BVA preparations for judicial review. While there is much uncertainty as to what impact judicial review will ultimately have upon their workload and operations, the BVA recognizes the fact that virtually all of their existing Rules of Practice and Appeals Regulations requires revision and many new rules and regulations will be required as well. At this time, about 250 pages of new or revised rules have been developed by BVA staff members since the passage of P.L. 100-687. In addition to the rules and regulation changes, many other changes have been required to appeal-related forms, form letters and the standardized correspondence that will accompany decisions handed down by BVA. In fact as recently as April 24, 1989, Mr. Eaton stated that the BVA planned to notify every veteran who had executed a Notice of Disagreement (NOD) on or after November 18, 1988, of the right to appeal. He expected that this notification would include the address to be used to file for a COVA review. Mr. Eaton stated that the date of that letter would be the date of notice setting in motion the 120-daytime limit for an appeal to the COVA. He went on to state that BVA would ask for an extension of that 120-daytime limit if necessary. There are now about 60 appeals subject to judicial review. Hence, the first efforts have been directed primarily towards external procedures and documentation needs.

At this point in time, the many internal BVA requirements relative to judicial review still must be addressed. The obvious first efforts will deal with revisions for BVA Board Sections and development of new or revised standardized language for use in BVA decisions. The VFW expects to have the opportunity to review and comment on the major proposed changes. However, at this point in time, we have not been provided with any copies of the above-mentioned rules, regulations, procedures or standardized response documentation.

Those who attended the VFW's National Veterans Service Officer Proficiency Training Conference during the last week of April 1989 in Phoenix, Arizona, received the benefit of some high level thinking on the United States Court of Veterans Appeals as it begins to take shape. The VFW assembled a panel to address judicial review consisting of Mack Fleming, Chief Counsel and Staff Director, House Veterans' Affairs Committee and Jonathan Steinberg, Chief Counsel and Staff Director to the Senate Veterans' Affairs Committee as principal contributors. They were joined by Donald L. Ivers, General Counsel, Department of Veterans Affairs; John Vogel, Chief Benefits Director; Ken Eaton, Chairman of the Board of Veterans Appeals, and Gary Hickman, Director Compensation and Pension Service, plus Robert Macomber, our own VFW Legal Consultant. Two major issues were made abundantly clear during this panel session. First, there was a consensus that current standards for representation of claimants by veterans service organizations are now ill-defined and vary from organization to organization. The expanded due process inherent in the establishment of the Court of Veterans Appeals is bound to demand more careful documentation in case work by Service Officers. Second, the Court of Veterans Appeals is somewhat of an enigma at this point in time since the rules for practice and procedure of that body have yet to be prepared and published. No one on the panel would even speculate about the standards of representation that would be required of the VFW, for example, before that Court. In mid-May 1989 the VFW's Legal Consultant, Mr. Robert C. Macomber, who is a member of the Veterans Benefits Committee of the Administrative Law Section of the American Bar Association, was nominated by that select group to participate in promulgating the rules of practice to be used by COVA. Mr. Macomber has 43 years of government experience working as an attorney. For 20 years, his primary duties with the Veterans

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Administration was to author, revise and edit the presently used Schedule for Rating Disabilities. Mr. Macomber is a member of Judge Nebeker's Advisory Committee. As you recall Judge Frank Q. Nebeker was confirmed in May to be the COVA Chief Judge. The Advisory Committee guidance is to work as if under the Federal Advisory Committee Act to review the Federal Rules of Appellate Procedure to determine which of these rules are applicable to COVA and then to revise the rules as necessary for COVA's use. This appears to be a reasonable course of action when we recall the fact Judge Nebeker came from the Federal District Court of Appeals.

This Advisory Committee meets weekly. Their goal is to have all the necessary rules for practice which will include rules for filing the record and rules for motions, writs, briefs, admission to the bar of the Court and administrative rules prepared for a presentation in late summer for Judge Nebeker's approval. The VFW expects these rules to then be published for comment by the several veterans' groups and other interested parties.

Mr. Chairman, this concludes my statement. It will be my pleasure to respond in more detail to any and all questions you and the Subcommittee members may have. Thank you.

STATEMENT OF
JOHN C. BOLLINGER, ASSOCIATE LEGISLATIVE DIRECTOR
PARALYZED VETERANS OF AMERICA
BEFORE THE
SUBCOMMITTEE ON COMPENSATION, PENSION, AND, INSURANCE
OF THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
CONCERNING THE
OPERATION OF THE BOARD OF VETERANS' APPEALS
JUNE 14, 1989

Mr. Chairman and Members of the Subcommittee, it is a pleasure for me to be here today to present the views of Paralyzed Veterans of America (PVA) concerning the operation of the Board of Veterans' Appeals (BVA). On behalf of the members of PVA, I wish to thank you for conducting this important oversight hearing and we appreciate the opportunity to testify today. I will focus my comments on the issues addressed in your letter of invitation - the timeliness of the appeals process; the quality of appeals; staffing needs at the BVA; actions taken to implement P.L. 100-687 regarding judicial review; and procedures to deal with the new Court of Veterans' Appeals (CVA). Prior to our discussion of the BVA, I wish to express PVA's gratitude for the Subcommittee's mark-up of H.R. 1334 and H.R. 1336 this morning. We wish to thank all those responsible - Cosponsors, committee staff, and Chairman Applegate - for ensuring that this legislation has reached the Full Committee. We will continue to work with you in any way we can to enact these bills into law.

As the 100th Congress came to a close last Fall, some of the most significant changes in the history of the Agency had taken place. The Veterans Administration had been authorized "Cabinet status" and veterans could now challenge decisions made by the BVA by taking their cases to the new Court of Veterans' Appeals. These events, plus changes such as the new "hearing officer" program have, collectively, laid the foundation for a more equitable and quality-conscious agency. Most recently, the Department has shown a new desire to review past policies and shed the "OMB-driven" insensitivity which has permeated the agency in recent years. A willingness to do what is in the veteran's best interest is, once again, beginning to prevail. We believe that, given appropriate resources, veterans have every reason to be optimistic about the direction in which the Department of Veterans Affairs is headed.

Mr. Chairman, as we enter this era of judicial review and the Department begins implementing new adjudicative and rulemaking provisions enacted in PL 100-687, it is clear that oversight examination and evaluation of the BVA is essential. As the final authority within the Department of Veterans Affairs, the Board is responsible for ensuring that all DVA benefits authorized by law are properly granted to eligible veterans and their families. The efforts of this Subcommittee to examine and evaluate the operation of the BVA will help to ensure that such claims receive complete and just review.

PVA's ability to offer credible testimony today is due, in large part, to our own on-going oversight capacity regarding the BVA. Since first becoming chartered by the Congress in 1971, PVA has developed an extensive veterans' service program which has, without charge, assisted thousands of veterans and their families process claims for DVA benefits. Our Veterans' Benefits Department includes 90 professionally trained service officers and 54 support staff, four National Field Directors, and four National Appeals Officers operating throughout the United States and here in Washington D.C. at the Board of Veterans' Appeals.

We work for veterans by helping them develop their claims, advising them of the merits of a specific case, and representing them before the DVA at both the Regional Office (RO) and BVA level. After September 1989, we anticipate

that we will be representing veterans before the Court of Veterans' Appeals as well.

In working with the veteran and the DVA, we are able to closely monitor both the quantity of veterans' claims being submitted to the Department and the quality of the DVA's ability to adjudicate those claims in a prompt and just manner. In regard to the BVA, our National Appeals Office represents approximately 1600 veterans per year and is in a unique position to closely observe the operation of the Board on a daily basis. It is in this oversight capacity that we are pleased to present our testimony today.

Over the years, PVA has found the DVA's claims and appellate process to be basically equitable and just. For the most part, the system does work. We believe the Board of Veterans' Appeals has the veteran claimant's well-being in mind. Likewise, we have trust and respect for the vast majority of BVA members who interpret title 38, USC, and all governing DVA regulations in a fair and equitable manner. This is not to say that the quality and timeliness of the adjudication and appeals process at DVA Regional Offices and the BVA could not be improved.

PVA continues to be concerned that due to budget cuts, staffing reductions, and the increased complexity of claims before the regional offices and the BVA, the Department has become less responsive in its timeliness and accuracy in claims processing. Statistics recently provided by the BVA indicate that response times are edging up from decade lows of 100 days just several years ago to 136 days in 1988. The Board predicts further increases in response times over the next five years. For the first half of 1989 alone, it has been taking the BVA on the average of 166 days to complete work on a case. Obviously, fewer cases will be completed which will result in increased backlogs. In FY 1988, the Board was able to dispose of 41,607 cases. For the first half of FY 1989, however, the Board has completed only 18,215 cases. When cases are reconsidered or remanded, the response times are much longer.

In the interest of accuracy and quality, PVA recognizes that there is a certain trade-off concerning response times. If resources and FTEE are held constant, response times will suffer when the Board's workload increases and members spend more time on cases. Without question, a balance must be struck with an emphasis on quality.

There are a variety of reasons for increased response times - some of them are the result of more thorough reviews by Board Members as a result of PL 100-687. In the absence of "courtesy signatures", the third Board Member is now performing a complete review of the facts in each case. Obviously this takes longer for the Board to reach a final determination. In this instance, however, the trade-off between timeliness and quality review is well worth it.

In regard to other reasons for increases in BVA response time, the Board can not be fairly assessed without taking into consideration the whole adjudication process within the Veterans' Benefits Administration (VBA). In FY '1988, over 67,000 Notices of Disagreement were filed by veterans and, as a result, the Board received close to 44,000 appeals from the regional offices. The overall elapsed processing time from the Notice of Disagreement to the BVA's final determination was nearly fourteen months. The Board's ability to handle an individual appeal in an acceptable period of time is, therefore, directly related to the huge pending workload and FTEE shortages in VBA. This must be corrected by restoring adequate staffing levels to VBA.

Of the 44,000 cases that reached the BVA last year, one in five were returned to the RO for corrective or additional action. Last August we stated before this Subcommittee that far too many administrative errors, resulting in time consuming remands, were being made by the regional offices. Such errors, both substantive and procedural, have a significant adverse effect on told, for example, that every formal appeal which is submitted to the BVA (as the result of a Notice of Disagreement on or after November 18, 1988) will be held by the Board for 150 days following the date of decision. This is to accommodate the provision in PL 100-687 which states that each veteran has 120 days to appeal to the Court of Veterans' Appeals. Obviously, both additional personnel and space will be needed to handle this extra workload.

Although holding these cases for the CVA would, at first, seem to be a simple administrative task, we anticipate that a variety of demands will be placed on the BVA to accommodate requests by regional offices, medical centers,

VSO's, Members of Congress, and other parties for information in the claims folder.

In addition, if cases are held for 150 days in Washington D.C., how will BVA allowances be awarded by regional offices in a timely and accurate manner? We are not convinced that current VBA automated data processing is sufficiently sophisticated to accomplish this task.

In the instance of BVA cases that involve two or more issues when one issue is denied and the other remanded, will the BVA hold part of the case for the CVA and remand the other part for the RO? The administrative and ADP demands placed on the BVA and VBA will, obviously, be significant and complicated.

Finally, in addition to holding these cases for 150 days, the Board will be tasked with assisting the DVA General Counsel with cases that are appealed to the CVA.

Without adequate resources, the BVA has projected that their response time on appeals will reach 500 days by 1995. This most certainly does not represent acceptable timeliness even if quality performance is perfect. We encourage this Subcommittee to continue to closely monitor the manner in which funds, specifically earmarked for Congressionally authorized FTEE at the Board, are actually spent by Central Office for this specific purpose. We are hopeful that the Department's new leadership recognizes the short-sighted policies employed by the previous Administration in regard to the BVA. Appropriate action must be taken to alleviate insufficient staffing, shortages and problems concerning space requirements.

Regarding the quality of the appeals function, PVA believes that the new "hearing officer" program and PL 100-687 have established an excellent foundation upon which quality and accuracy can be improved. In our testimony before this Subcommittee on May 9, 1989, we addressed the issue of the "hearing officer" program and, although the long-range effect of this program remains unknown, we praised the early results with cautious optimism. Because some cases which would ordinarily go to the Board will, instead, be ruled on favorably by the RO Hearing Officer, we may eventually see a decrease in the allowance rate at the BVA. We hope, however, that the end result of the program is decreased workload at the BVA, decreased remands, and most importantly, fair and timely decisions for claimants. In view of the fact that BVA statistics concerning workload and dispositions have not changed significantly since last summer, we believe both the BVA and VBA should take a hard look at the "hearing officer" program to make certain it is fulfilling its intended mission.

Although overall quality of review at the BVA continues to be a concern for PVA, we believe the implementation of a number of the provisions in PL 100-687 has already improved some aspects of the review process. Once again, the theme of "quality" versus "timeliness" is present.

Our National Appeals Office reports that the Board is being more thorough in their review of cases. This may be due to either PL 100-687 or to the anticipation of potential review of cases by the CVA. In some instances, this results in remands which may not have occurred prior to PL 100-687. Although we do not believe that a reduction in the remand rate should necessarily be the ultimate goal of the Board, we believe the Board should closely monitor the reasons for these remands and ensure that such action is absolutely necessary in each case. Although we believe remands generally operate to the benefit of individual claimants and reflect full due process, they have a significant adverse effect on timeliness as it pertains to the whole appellate process.

For severely disabled veterans, the importance of the BVA Travel Board takes on additional significance. Regarding the implementation of requirements for the BVA Travel Board, we note that claimants are now being advised of their right for such a hearing on the application for substantive appeal. Unless the BVA is able to expand the Travel Board, however, we are doubtful that the intent of this good provision will ever be fully implemented. The Travel Board provides an excellent service - we are hopeful sufficient funds are provided in order that all claimants who wish to use it can be afforded that opportunity.

The Board also appears to be implementing other aspects of the Judicial Review Act in a timely manner. Numerous administrative issues including manual and form revisions are in the process of being changed. Preparations

for BVA's role in the litigation process with respect to the Court of Veterans' Appeals is also being defined, according to BVA management.

In conclusion, we anticipate initial preparation for the new Court of Veterans' Appeals to be an intense process. We can only speculate, at this point, what the long range needs of the Board will be and how veteran claimants will be affected by such needs under the umbrella of judicial review. We can say definitely, however, that the foundation of the whole appellate process, as expressed in PL 100-687, provides a fair and equitable system upon which the VBA, the BVA, and the new Court can build. It is now up to Department of Veterans Affairs leadership to do everything within their power to make certain that, in the cases of VBA and BVA, adequate resources and FTEE are available to get the job done.

Mr. Chairman, that concludes my statement. I will be pleased to answer any questions you may have.

STATEMENT OF
 RICHARD F. SCHULTZ
 ASSOCIATE NATIONAL LEGISLATIVE DIRECTOR
 DISABLED AMERICAN VETERANS
 BEFORE THE
 SUBCOMMITTEE ON COMPENSATION, PENSION, AND INSURANCE
 OF THE
 HOUSE COMMITTEE ON VETERANS AFFAIRS
 U.S. HOUSE OF REPRESENTATIVES
 June 14, 1989

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

On behalf of the more than 1.2 million members of the Disabled American Veterans and its Ladies' Auxiliary, I wish to thank you for the opportunity to express our views relative to the operation of the Department of Veterans Affairs' (VA) Board of Veterans Appeals (BVA) and actions taken to implement Public Law 100-687, the "Veterans Judicial Review Act."

At the outset, Mr. Chairman, the DAV wishes to again commend you and the members of the Subcommittee for your continued interest in the operation of BVA. The oversight activities of this Subcommittee, over the past several years, have had a meaningful impact on the operation of the Board of Veterans Appeals and sends a clear message to BVA, and our nation's veteran population, that nothing less than top quality timely appellate determinations are to be rendered on veterans appeals for benefits from the VA.

As you know, Mr. Chairman, DAV membership is limited to honorably discharged veterans who were wounded, injured, or otherwise disabled in wartime service to our nation. It therefore follows, that our organization's primary concern is to assure that America's service-connected disabled veterans, their dependents and survivors, receive the VA benefits and services to which they are entitled. DAV services are not, however, restricted solely to service-connected disabled veterans, as we offer counseling and representation to all veterans and their families on any claim they may pursue for benefits administered by the VA. DAV services are free of charge and without regard to membership in our organization.

In order to ensure that our nation's veterans and their families receive VA benefits to which they are entitled, the DAV employs approximately 280 full-time, professionally trained, National Service Officers (NSOs) located throughout the country. While DAV NSOs provide counseling on a wide-range of VA benefits and services, the majority of their activities are dedicated to assisting and representing veterans and their dependents on their claims for compensation, pension and survivors' benefits at VA Regional Offices (VAROs).

To ensure that each individual VA claimant receives complete and thorough DAV representation throughout the claims processing system, the DAV also maintains a National Appeals Office in Washington, DC. This office is staffed by nine highly-skilled National Appeals Officers (NAOs), two Staff Counsels, and a Medical Consultant whose primary responsibilities are to ensure, in all cases where the DAV has been appointed as the individual's representative, that each appeal is clearly and accurately articulated in its most favorable light to the Board of Veterans Appeals. DAV NAOs also initiate requests for reconsideration of BVA decisions where we believe there has been an error in the Board's decision.

Mr. Chairman, as you know, the mission of the Department of Veterans Affairs is to serve America's veterans and their families with dignity and compassion, and to be their principle

advocate in assuring that they receive the care, support and recognition earned in service to this nation. Also, the VA's Veterans Benefits Administration (VBA) is charged with the responsibility of ensuring that an appropriate level of benefits are provided within the law to eligible veterans, their dependents and survivors.

In order to ensure that VBA, through its regional offices, is granting all benefits authorized by law to veterans, their dependents and survivors, there exists a Board of Veterans Appeals. The objectives of the BVA Appellate Program are outlined in MBVA-1, Part 1, as follows:

1.04 Objectives of the Appellate Program

- A. Major. Major objective is to equitably decide appeals under all laws administered by the VA, with sympathetic understanding, as expeditiously as possible, consistent with quality, in order to grant all benefits to which veterans and their dependents are entitled.
- B. Specific. Specific objectives are:
 - 1. To promulgate quality decisions which are equitable, comprehensive, fully reasoned and self-sustaining.
 - 2. To maintain a high level of promptness in deciding appeals consistent with the quality of decisions expected of an appellate agency of last resort.

To accomplish these objectives, BVA is organized into 21 board sections. Each board section is comprised of three members: a Chief Member (attorney), a Medical Member (physician), and a Legal Member (attorney). In addition, each section has assigned to it approximately six "Attorney Reviewers" and a secretary.

Quality Review

In an effort to assure that our nation's veterans and their families receive fair and equitable appellate decisions, the Board of Veterans Appeals has in place a quality review program whose objectives, as stated by BVA, are:

- 1. To assure that all appellate decisions will meet the Board's standards of substantive accuracy and legal sufficiency;
- 2. To assure that all written decisions convey the Board's findings clearly and effectively with compassion and sensitivity towards the veterans and their dependents; and
- 3. To assure that a certain level of consistency is maintained among decisions and Board sections, while still preserving the Board members' decision making independence.

Initially, all Board decisions are subject to a review by the Appellate Index and Retrieval System (AIRS). This staff, composed of attorney reviewers from all Board sections on a rotating basis, has the primary responsibility to conduct an editorial review of proposed BVA decisions which basically examines decisions for typographical and format errors. Decisions found to contain an error are referred to the next higher level of quality review.

The second stage of quality review is conducted by select Senior Attorneys who conduct an in-depth review of decisions referred to them. Decisions appearing to contain substantive or nonsubstantive errors, in addition to a random sample of decisions from each Board section, are then forwarded to one of the two Deputy Vice Chairmen for their review. Additionally, certain types of cases i.e., reconsiderations, administrative allowances, and cases dismissed for lack of jurisdiction are referred to this stage of quality review. Lastly, all final decisions are again screened for errors, indexed and placed in BVA's decision data base.

Mr. Chairman, we note that during Fiscal Year 1988, BVA subjected 17.2% of their decisions to the second level of quality review, down from 18.5% in Fiscal Year 1987. We are pleased to note, however, that during the first-half of Fiscal Year 1989, 26.4% of all BVA decisions have been subjected to the second stage of quality review. Hopefully, BVA will continue to subject a high number of their decisions to this in-depth quality review process.

Mr. Chairman, we believe that BVA's quality review system -- one which the DAV will continue to closely monitor -- represents a sincere and bonafide attempt to ensure that BVA appellate decisions are fair, equitable and consistent with the intent of Congress.

Timeliness

Mr. Chairman, as you know, in addressing the issue of timely appellate determinations by BVA, Congress passed legislation which resulted in the enactment of Public Law 98-223. This law, in part, provided for an increase in the number of BVA board members from 50 to 65, a 30% increase in appellate board membership staff.

While Public Law 98-223 certainly helped BVA in their efforts to provide timely, accurate appellate decisions, we are now witnessing a dramatic increase in the time it takes BVA to render a decision. In Fiscal Year 1987, processing time increased 27 days over that of the previous year. While Fiscal Year 1988 processing time increased only six days over Fiscal Year 1987, we are witnessing substantial increases in the present time it takes to process appeals.

According to BVA statistics, during the first half of Fiscal Year 1989, it has taken BVA an average of 166 days to process an appeal, 30 days more than last year. When adding this number to the 290 days it takes VA regional offices to process an appeal, one can readily see that veterans, their dependents and survivors must wait an intolerable amount of time (nearly one and one-half years) to receive a decision on their appeal.

Mr. Chairman, there are a number of factors which affect timeliness in the appeals process. These include: an increased number of appeals, greater emphasis on quality review, and a continued declining the number of employees available to process appeals.

A close look at the workload of BVA reveals that each claims folder must be physically handled by several individuals -- clerk typists, schedulers, attorney reviewers, three board members, quality review personnel, etc. As is readily apparent BVA functions are extremely "labor intensive." However, every year, for the past several years, BVA employment levels have been reduced as their workload has been steadily increasing.

Mr. Chairman, as you know, the Administration's budget request for Fiscal Year 1990 calls for additional reductions of employees at BVA. This, coupled with the implementation of the Court of Veterans Appeals (COVA), scheduled to begin operations September 1, 1989, will place increased administrative burdens on BVA, and exacerbate the existing problem of timely appellate decisions. Realistic staffing for BVA must be provided now, if appeals by members of our veterans community are to receive timely consideration.

Mr. Chairman, in your letter of invitation to present testimony today, you also requested our input on timeliness and quality in the appeals process as it pertains to the work being done on claims and appeals at VA regional offices. In our testimony presented before this Subcommittee on May 9, 1989, we pointed out several problem areas affecting both timeliness and quality at regional offices. While I will not herein repeat all of our observations and concerns relative to the adjudication of veterans' claims, I would like to again point out that the significant loss of employees at regional offices and the inadequacy of computer-generated correspondence sent to veterans regarding their claims, greatly add to the increased number of appeals being filed by members of the veterans community.

Statistical data reveals that the number of appeals continues to increase each year while overall workload has declined. Also, the number of appeals being returned to regional offices (remands) for additional development continue to rise. During the first-half of Fiscal Year 1989 BVA returned 21.5% of all appeals for additional development. Simply put, Mr. Chairman, the quality of appeals sent by regional offices to BVA continues to decline. Without additional funding for employees and technological enhancements, this intolerable situation at regional offices will continue.

Mr. Chairman, you have also solicited our views regarding the affects of Public Law 100-687, as it pertains to judicial review of veterans claims, on the operation of BVA. As you know, the Court of Veterans Appeals is not scheduled to begin operation until September 1, 1989. Therefore, much is yet to be learned of the effects of its operation on BVA and regional offices. Nonetheless, we do have some observations in this regard which I will now discuss.

Mr. Chairman, Public Law 100-687, among other things, made several changes which affect some BVA personnel and the operation of BVA. These include:

- * The Chairman of BVA will now be appointed to a six year term by the President and confirmed by the Senate;
- * Associate Board members are appointed to nine year terms by the Chairman of BVA with approval of the President;
- * Decisions by Board Sections are by majority vote;
- * Decisions by Board Sections are final unless the Chairman orders a reconsideration;
- * Decisions of the Board are to be made on the entire record after an opportunity for a hearing;
- * Cases may be reopened only when new and material evidence has been presented;
- * Decisions of the Board are to include written findings and conclusions with reasons, as well as an order granting or denying relief;

- * The Statement Of the Case is to include a discussion of "how laws and regulations affect the agency's decision";
- * There is no presumption of agreement with the Statement Of the Case;
- * Hearings before the Travel Board are on a first come, first served basis and;
- * Incentives available for Board members must take into account quality of performance.

Mr. Chairman, without commenting on the merits of each of the aforementioned changes, we would just like to say that the DAV fully understands that these changes were made in an effort to assure that BVA operates in the best interest of claimants and benefits are granted consistent with the intent of Congress.

Mr. Chairman, the DAV is concerned however, that when COVA commences operation on September 1, 1989, there will be new administrative burdens placed on BVA -- burdens which they are ill-equipped to handle in terms of staffing. As mentioned earlier, BVA employment levels continue to decline while their workload increases. In discussing this issue with Mr. Kenneth Eaton, Chairman, Board of Veterans Appeals, we are informed that BVA projects a need for an additional 20 employees to handle the increased administrative workload which will be placed upon them as a result of COVA operations. These additional employees will be needed to prepare records to be sent to COVA, work with VA General Counsel and track court decisions. Also, it is estimated that additional space will have to be made available to store an estimated 20,000 additional case files, which will be held at BVA.

Mr. Chairman, DAV has also been made aware that all cases eligible for COVA review are to be held at BVA for a period of 150 days following the Board's decision on an appeal. This, we are told, is to maintain the "integrity" of and "protect" the record should BVA's decision be appealed to COVA.

Mr. Chairman, while we certainly understand the need to maintain an accurate record for COVA, we can foresee several problems as a result of this policy. By holding all cases (favorable and unfavorable decisions) at BVA for 150 days following appellate determination, numerous problems may occur at VA regional offices in the promulgation of ratings without the benefit of the claims folder. Also, veterans often may have (unrelated) reopened or new claims filed at the regional office awaiting the return of the claims folder. (Many of these claims may not be acted upon without the service medical records or other information contained in the veteran's file). Suffice it to say, the policy of holding claims folders at BVA for 150 days following a decision will cause many administrative problems for both BVA and regional offices. These and other problems must be worked out if veterans are to receive the benefits granted by VBA in a timely manner.

Mr. Chairman, at this juncture, while on the subject of COVA, we would like to interject here that we are aware of Chief Judge Nebeker's intention to use the "Federal Rules of Appellate Procedure" as a starting point for the presentation of cases before COVA. We certainly understand that Chief Judge Nebeker must establish standards to be followed by attorneys and representatives who appear before COVA. However, we cannot overemphasize the importance of keeping COVA "user friendly" so that individual veterans may represent themselves before the court or use veterans' service organization representatives

should they so desire. We believe Congress fully intended a Court of Veterans Appeals that provides easy access to veterans, and their representatives of choice.

Mr. Chairman, at this time, we would also like to briefly comment on the proposed changes to VA Form 1-9, Appeal to the Board of Veterans Appeals. As you know, this form accompanies a veteran's claims file to BVA and contains an appellant's arguments regarding the benefits sought on appeal. The draft copy of the revised new VA Form 1-9 we obtained from BVA consists of three pages of small print instructions informing the appellant of his or her appellate rights and requirements for filing an appeal. Also, the form itself contains additional small print instructions relative to a request for a personal hearing.

Mr. Chairman, our first observation about the proposed new VA Form 1-9 is that it contains a lot of information and instructions in very small print. Perhaps these instructions could be printed in pamphlet form to accompany the 1-9. Also, Mr. Chairman, this revised form contains the statement that "most appellants do not choose to appear personally at a hearing." In our view, this is unnecessary and unacceptable since it is likely to discourage some appellants from requesting a hearing when, in fact, a personal hearing may be in their best interest. As you know, the allowance rate at BVA is higher when a claimant appears personally before the Board.

Mr. Chairman, we sincerely hope that our observations relative to the operation of BVA, and how the new court will impact upon its operation, are of assistance to the Subcommittee when contemplating what action it will take to alleviate the growing backlog of appeals pending before BVA. Certainly, our nation's veteran population deserves a timely response to their appeals for benefits earned as a result of military service to this nation.

This concludes my statement, Mr. Chairman. Again, we wish to thank you for this opportunity to present our views on this most important topic.



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Statement of

VIETNAM VETERANS OF AMERICA, INC.

Presented By

RICHARD E. O'DELL
VICE PRESIDENT
and
CHAIRMAN OF VVA'S COMMITTEE ON ADVOCACY

and

PAUL S. EGAN
LEGISLATIVE DIRECTOR

Before the

HOUSE VETERANS AFFAIRS SUBCOMMITTEE ON
COMPENSATION, PENSION AND INSURANCE

on

OPERATIONS OF THE BOARD OF VETERANS APPEALS

JUNE 14, 1989

Mr Chairman and members of the Subcommittee, the Vietnam Veterans of America, Inc. (VVA) appreciates the opportunity to present its views on the operations of the Board of Veterans Appeals (BVA). This oversight hearing is particularly relevant because it offers an opportunity to examine the BVA's operations in the context of what if any modifications are planned as the new Court of Veterans Appeals (CVA) comes into play next September. Some adjustments are expected since the Veterans Judicial Review Act of 1988, P.L. 100-687 requires some modifications.

With this in mind, we will frame our testimony by commenting on a variety of new regulations designed to govern adjudications in light of the judicial review Act. The VVA was anonymously supplied with a copy of an April 24, 1989 "Working Draft" of the new regulations and we shall use that document as a base from which to offer comment. It should be added at this point that we are under the impression that the April 24 "Working Draft" has been supplanted by a subsequent draft and for that reason it may very well be that some of the expressed concerns in our statement have been rendered moot by DVA-generated remedial changes in the draft regulations.

Whether or not adjustments in the draft have been made, it remains fully appropriate in our view to express reservations. In this way, if remedial changes in the draft regulations have failed to be made, at least that failure won't have escaped this subcommittee's attention.

Before proceeding, Mr Chairman, we would be remiss if we omitted an expression of thanks to you for your perseverance on the issue of the BVA's operations. It is no mystery that this particular subject has become somewhat controversial over the last two years with revelations widely reported in the press concerning a number of improprieties in the BVA's handling of appellate adjudications. Some of the most egregious of these practice have been abandoned, at least ostensibly, while others continue. The point here, Mr Chairman, is that lesser individuals than yourself might have been easily tempted to turn a blind eye to the Board. Instead, you have held frequent hearings on this subject and we commend you for this.

REVIEW OF RECENT DEVELOPMENTS

As the subcommittee will recall, the VVA advanced the view at the October 6, 1987 hearing that the BVA was inappropriately compromising its appellate independence and objectivity by stimulating production with year-end bonuses for high producing BVA sections and section members. We also called to question at that hearing the appellate propriety of holding BVA sections, section members and staff attorneys to production quotas.

On June 7, 1988, presumably in response to a lawsuit filed by the VVA on May 5, 1988, Chairman Eaton suspended the use of year-end bonuses. Superficially, this could lead one to believe that the BVA's independence would be protected from year-end bonus-fed production goals. This, however, is not necessarily the case. The production goals at the BVA are apparently still in place and this leaves open significant opportunities for claims to be treated improperly in an overall rush to meet these production requirements.

Added to this, and in full view of the fact that Chairman Eaton has stated at public hearings that he remains interested in finding a way to replace the year-end bonuses, the prospect of spurring production through the uses of promotions, demotions, inter-sectional transfers and G.S. grade or step increases continue to threaten the objectivity, thoroughness and integrity of appellate claims adjudications.

Another serious issue raised before this subcommittee (at its August 11, 1988 oversight hearing, prior to that in the May 5, 1989 VVA lawsuit and at the Senate Veterans Affairs Committee's June 9, 1988 oversight hearing) concerns the maintenance by the BVA Chairman of a "Chairman's Personal Signature List." This too was apparently suspended by the Chairman on June 7, 1988 but when operational it was a listing of House and Senate members whose inquiries on individual claims were given special personal attention by the Chairman. Again superficially, the termination of this particular practice gives the appearance that all claims can now be handled with equal dispassion. While it is certainly hoped this is true, the authority of the Chairman to expand panels or depend upon the willingness of some Board members to provide "courtesy signatures" (defined below) on claims decision documents without having reviewed the claim provides an ongoing, albeit less obvious, means to continue the practice of providing special consideration for some claims.

This situation is terribly worrisome since it, once again, leaves the independence, objectivity and integrity of the BVA open to compromise. In our view, as long as the Chairman retains the unilateral authority to channel claims to specific sections, expand sections and control the career advancement of Board members, he or she will remain vulnerable to political pressures on individual claims. We would encourage this subcommittee to seriously consider legislation to define the process of handling claims by expanded panels as a safeguard or shelter for the BVA Chairman against improper political pressure. A process providing this shelter could further safeguard Board objectivity and could be devised by using a lottery system for selecting individuals named to expanded panels.

Another of the practices at the Board of Veterans Appeals raised in both our May 5, 1988 lawsuit and at this subcommittee's August 11, 1988 hearing was briefly referred to above. This is the practice in which members sign off on an appellate decision without having reviewed the claim, and in some instances without even having read the claim, as a courtesy to the other members of a Board section. Known as "courtesy signatures" this practice often involves not only one of the three section members, but two. Under these circumstances, fairness cannot be said to have been rendered.

Courtesy signatures are another example of what appears to have grown up at the BVA as an efficiency oriented subculture in which all is subordinated to a production imperative. This practice has taken place on an inter as well as intra sectional basis. That is, courtesy signatures are secured from individuals outside as well as inside of a decision-making section.

We are unsure of any specific actions taken by the BVA Chairman to either halt or curtail this practice. This is not to suggest that the practice continues to be as common at the BVA as it was prior to the filing of our lawsuit. Indeed, the Chairman may have taken some steps to curb the use of courtesy signatures. Nevertheless, it may well serve the subcommittee to query the Board Chairman as to his current views on the subject. Apart from this, we firmly believe it to be appropriate to enact a statutory bar to the use of courtesy signatures. Along with such a bar, a deterrent should be incorporated which would call for immediate termination of employment for anyone found to be soliciting or providing courtesy signatures.

"WORKING DRAFT" REGULATIONS OF APRIL 24, 1989

As mentioned at the outset, the VVA has been anonymously provided with a draft copy of the regulations designed to implement that part of the Veterans Judicial Review Act of

1988 (VJRA) which deals with the BVA. The text of this document is 198 pages in length covering a broad range of issues, many of which extend well beyond the intent and requirements of the Judicial Review Act itself. It is divided into two basic sections, "Appeals" and "Rules of Practice". The length and complexity of this document have made it impossible to fully describe its contents in this statement given the relatively short period since it was received. That being the case, we will discuss selected portions of the regulations as a way of illustrating for the subcommittee some of the liberties taken by the DVA in apparently using the VJRA as a springboard for making other unrelated and more ominous policy adjustments.

As stated at the outset, we are well aware of the possibility that further amendments to the April 24 Working Draft may have been made. Nevertheless, the subcommittee may well benefit from advance knowledge of how the DVA might configure its new BVA regulations. From a limited review of the Working Draft, it must be noted that there seems a clear intention to augment the BVA Chairman's powers and authorities beyond what was intended by Congress in the VJRA. It is also apparent that the DVA's new BVA regulations, as outlined in the Working Draft, seem somewhat hostile to due process considerations.

Given the complexity and wholesale nature of the new BVA rules, it may be worth the subcommittee's while to firmly encourage the DVA to adopt a mechanism for development of the new rules in an open environment in which interested parties could participate in the process of rules development. Such a mechanism is used by a variety of other agencies that are also subject to the Administrative Procedures Act. Instead of publishing the new regulations in the Federal Register and offering a limited period for comment--a period almost surely inadequate given the breadth of the new regulations--we suggest that a notice be published in the Federal Register announcing a request for regulatory negotiations with interested groups with a clear stake in the outcome of a regulatorily reformed BVA. Such a process would cast sunshine on the regulatory development process and send a clear signal to the veterans community that the agency is willing to do the serious business of veterans claims adjudications in the open. It seems clear enough as well that such a move on the part of the agency would send an unambiguous signal to the new Court of Veterans Appeals that the agency's new BVA rules--some of which will likely be judged by the new CVA--will have been developed in a participatory manner giving credence to the appellate process and assuring some degree of confidence in the new rules by all who must abide by them.

In the following discussion of the new draft regulations, each will be identified by the proposed new regulation number. In parentheses, the number of the old regulation on which the new regulation is based will be used. These designations will be preceded by our own characterization of the subject matter of the regulation and will be followed by the page number in the Working Draft where it appears. A copy of the Working Draft is provided to the subcommittee for its review and, if desired, inclusion in the hearing record.

Designation and Redesignation of Chief Section
Members 19.3 (19.110), p.53

This proposed new regulation, in part, gives authority to the BVA Chairman to designate Chief section members and the further authority to redesignate law members of sections to be Chief members. While there is nothing in the VJRA conferring this authority, as a practical matter the BVA Chairman probably should have the authority to name Chief section members when vacancies occur due to retirement, death or failure to be renamed to the Board after a term of office.

The BVA Chairman probably ought also to be given this authority in order to reconstitute the BVA for the first time following enactment of the VJRA.

However, under any of these circumstances, the Chairman should be required to fill the Chief member positions using a specified criteria such as seniority, qualifications and most certainly on the basis of expertise in the areas over which specific sections judge appellate claims. As referenced above, such a criteria would protect the chairman from charges of attempting to influence sections or of attempting to assemble allowance-prone or denial-prone sections. It would also prevent the Chairman or any of the BVA's sections from being subject to political influence from the DVA's Central Office or elsewhere.

On the subject of giving the BVA Chairman the authority to redesignate the Chief members, there is once again no specific instruction provided by the VJRA. Unlike the authority to name Chief members, the authority to redesignate Chief members would be quite troubling. No such authority either currently exists or has ever (with one recent exception) been used. This exception is the case of Ernest Wright who was removed as Chief member almost immediately following his testimony before the Government Operations Subcommittee on Human Resources and Intergovernmental Affairs. As each of us knows, that particular testimony was sharply critical of BVA operations and practices under the current BVA Chairman. Mr Wright's demotion was not only unprecedented in the over 50 years of BVA existence, it demonstrated a rather cavalier willingness on the part of the current BVA Chairman to exact reprisals from those honest enough to come forward to discuss serious improprieties in appellate adjudications. The expected result has been an unfortunate chilling of the atmosphere at the BVA and a generalized fear among Board members of expressing dissenting views on legitimate issues under adjudicative review. This is most especially true when the Chairman indicates and interest in a particular claim.

Presumably, the authority to redesignate Chief members would also allow general reshufflings of Board sections. This prospect is worrisome because it presents an inappropriate opportunity for the Chairman to "stack" sections in accordance with either his or her own lights or according to the whims of political pressure.

Expanded Panels for Reconsideration of Claims
19.11 (19.189(b)), p. 59

This rule would give the Chairman the authority to assign expanded panels for reconsideration of claims. The summary notes accompanying the proposed new rules justify this by citing a need for "more flexibility in view of the requirement of a majority opinion". First of all, giving the Chairman blanket authority to expand a panel by adding Board members of his or her choice may be justified on the basis of "flexibility" but most surely can also be seen, given past BVA practices, as a grab for the power needed to engineer desired outcomes in appellate reconsideration decisions. We see no redeeming or compelling reason to confer this kind of potentially abusive authority on the Chairman. In light of an alternative which would select members for expanded panels based on a lottery system, no such authority would be needed and withholding this type of authority in favor of a lottery system would offer a much better guaranty of impartiality.

Moreover, the need for a BVA to decide in favor of an expanded panel in cases of reconsideration could be obviated if two-to-one decisions by an original panel of three members were required to be granted. This would be consistent with the principle of granting the veteran the benefit of reasonable doubt. Similarly, nothing in the VJRA statute, as we read it,

would prevent the promulgation of a regulation awarding two-to-one decisions to the veteran without an expanded panel.

In any event, because expanded panels have been susceptible to manipulation in the past, it seems reasonable to add a statutory requirement that the BVA Chairman provide Congress with an annual report detailing each decision to use an expanded panel. Such a report should include a description of the circumstances in which expanded panels were used and the final decisions of each expanded panel. In addition, the Chairman should be required to certify in writing the criteria used in each action taken to use an expanded panel.

Travel Boards of the BVA
19.300 (new), p.79

This is a new regulation required by the VJRA. It provides that each Regional Office of the DVA that generates appeals must maintain a Travel Board hearing docket. In our view, this doesn't go far enough. In addition, the regulation should prescribe requirements governing the frequency of travel by Travel Boards and the accessibility of the Travel Board to veterans. The language governing travel by the Tax Court could and should be applied to the BVA. The particular language of the law governing travel by the Tax Court reads as follows: "The times and places of the sessions of the Tax Court and its divisions shall be prescribed by the chief judge with a view to securing reasonable opportunity to taxpayers to appear before the Tax Court or any of its divisions, with as little inconvenience and expense to taxpayers as is practicable." To adapt this language to the BVA, the terms Tax Court and taxpayers could easily be replaced with the terms Board of Veterans Appeals and veteran appellant respectively.

BVA Chairman-Prescribed Procedures in
the Absence of Appellate Rules
19.1002 (19.101(b)), p.84

This new rule would significantly expand the authority of the BVA Chairman in an unspecified way and without any particular justification. Current rules authorize section Chiefs to establish rules of practice in the absence of already prescribed rules or procedures. Apart from questioning the reason for further augmenting the Chairman's authority, we suggest that the Administrative Procedures Act requires publication in the Federal Register and public comment prior to adoption by the agency of any new procedure.

Restriction on Appeals
19.1201 (19.118) p.94

This new proposed rule would add a restriction on Appeals to the BVA by requiring that a claimant must make it clear which determination he or she disagrees with on the Notice of Disagreement when the Regional Office gives notice that it made adjudicative determinations on several issues at the same time. Superficially, this seems harmless enough, but on closer examination it could significantly narrow the scope of an appeal on an issue improperly adjudicated by the Regional Office in the first place.

It is unlikely that an appellant could go beyond a general description of a specific point of disagreement in many instances because the Regional Office's statement of the case often omits any detailed description of how evidence was weighed in a decision to deny a claim. The need for better decisions by Regional Offices, in this regard, has been well documented and was the subject of a recent GAO recommendation holding that "Social Security Administration notices, provided a more complete explanation of the decision than VA

does. GAO believes it is equally important for veterans to know what evidence has been considered by and how it was used in reaching a decision. Without such knowledge, veterans are not in a position to make an informed choice about whether to appeal the decision." (emphasis added)

Forcing Attorney/Representative-Client Relationships
19.1608 (new), p.126

This new rule uses no previous or existing regulation as a basis and bears no relationship to the VJRA. In essence it is designed to prevent the withdrawal of service by representatives of veterans once an appeal has been certified by the BVA and docketed. As a practical matter, this proposed new rule is unworkable since many veterans confer specific veterans service organizations with power of attorney in their claims without ever notifying the veterans organization. As a professional matter, it is unethical to compel an attorney or representative to represent a client.

It has long been the practice of the VVA to carefully screen the veterans it represents given limited resources and the fact that the VVA has always used attorneys or closely supervised law clerks to represent appellate claims. Under the circumstances, it is improper for the BVA's rules to be configured in a way that compels the expenditure of scarce VVA resources. This prospect is additionally improper because it vests effective decision-making authority with the BVA rather than with the representing organizations over who will and will not be represented.

Appellate Hearing Restrictions
19.700(19.157), p.141, 19.1708(19.160), p.152 and
19.11003 (19.189(a)), p.181

These proposed rules would have a significant effect on the ability of a representative's or an attorney's ability to advance claims before the BVA and the CVA in the event of a denial. First of all, these rules would require the veteran's representative to show "good cause" in order to represent the claimant at a hearing to which the veteran was unable to attend. Apart from the lack of any definition of "good cause", there is no good reason why a veteran claimant must always be present. Many hearings involve technical or legal questions the nature of which should not require the veteran to be present. Added to this, many veterans are unable to attend a hearing because of illness or the nature of a physical condition.

A second objectionable matter under these rules empowers the Chief section member or presiding officer to set time limits for the presentation of arguments. Additionally, documentary evidence and testimony said to be irrelevant to the issues could be unilaterally excluded. In the extreme, it might make sense to empower a presiding officer with the authority to stop something akin to a filibuster, but this particular authority is an open invitation to heavy-handedness and might be used to continue the Board's past practice of placing greater emphasis on production than on quality decision-making. This part of the new rules is completely unacceptable.

A third problem with these particular rules concerns the free use of DVA-provided cassette-recorded arguments at "informal hearings". The use of cassette-recorded arguments no longer than 30 minutes in length instead of an actual presentation before a live hearing panel is a misnomer. These are not really hearings and should not be labeled as such. Instead, they might be better titled "record reviews". This rule would codify an existing practice that should more appropriately be discarded. The service organizations often use the cassette-recordings instead of making a presentation

at a real hearing and the BVA's administrative personnel provide cassette-recording argument transcripts for Board review for free. This may constitute a conflict of interest.

Moreover, it should be noted here that the BVA is often reluctant to provide transcripts of tapes from actual hearings for use by representatives of claimants considering the option of a BVA reconsideration. With the new CVA and the 120 day limit within which to appeal a BVA decision to the CVA, the transcripts of actual hearings are a must. If BVA appellate claims are denied, transcripts should be provided automatically along with the denial decision.

Withdrawal of Right to a Hearing in Absence
of Veterans Presence
19.1702 (19.159), p.143

Under this rule when a hearing is scheduled and the veteran fails to appear, the BVA would be permitted to treat the claim as if a hearing request had been withdrawn. In addition, no hearing would be rescheduled unless "good cause" was shown. Apart from the lack of any definition of "good cause", the hearing could presumably be cancelled along with the veteran's right to a hearing even if his or her representative were present at the hearing and were prepared to make presentation of argument.

Once again, there is no apparent requirement for these rules stemming from the VJRA. Instead, they appear ill conceived and even punitive.

Travel Board Hearings That May Not Be Hearings
19.1707 (19.160), p.155

This proposed new rule would add a significant adjustment in the way Travel Boards conduct themselves. It states that a hearing on reconsideration before a Travel Board will not necessarily be before the members who will make the final decision. If the presiding Travel Board members won't be making a decision in the appellate claim, who will and on what basis?

This rule also specifies that the same circumstances as above could occur even if the Travel Board had fewer than three members. On balance, the form (VA Form 1-9) on which notice of disagreements are registered already misleads veterans into believing that a hearing by three Regional Office members constitutes a BVA hearing. It is not, but are we to believe the DVA is now prepared to add Travel Board hearings to the list of those that are not actually BVA hearings?

Restrictions on Submission of New Evidence
19.1800 (19.172), p.170 and 19.11304 (19.174), p.193

These proposed new rules would place a 60 day limit within which to revoke a power of attorney, submit new evidence or request a hearing once a notice that a case had been sent to the BVA has been issued. This is a departure from current practice in which no limits are imposed. These rules also would again augment the Chairman's authority with no obvious justification. Similarly, the term "good cause" is used as the basis upon which the BVA Chairman could grant exceptions to the time limitation. Once again, a definition of "good cause" is conspicuously absent.

Elimination of Consistency as a Goal in BVA Decision-Making
19.11303 (19.197), 19.200), p.192

This rule would eliminate the current regulation

requiring the BVA to strive for consistency in decisions on similar claims. The BVA is already exempt from precedent and is therefore generally free to depart from decisions on similar previous claims. To go even further by abandoning the desirability of consistency is puzzling. Given the fact that the new CVA will likely decide cases based on similar claims adjudicated by the BVA, it also seems likely that the CVA will require some semblance of consistency at the BVA. That seeming eventuality makes it difficult to understand why the new proposed rules would delete a requirement to strive for consistency.

Mr Chairman, at the outset of this statement, a general discussion was offered as to the current status of unacceptable BVA practices. Many of these are the substance of a lawsuit we filed last May. That suit is still pending with no new developments to report.

However, in discussing the Working Draft of the new proposed regulations for the BVA, it seems wise that some of these practices should be specifically prohibited in the new regulations. Prohibitions against some of these should also be codified in statute, but adding regulations to prohibit many of them would also be useful. These would include barring the use of production quotas, year-end bonuses and courtesy signatures.

Mr Chairman that concludes our statement.



THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

AUG 2 1989

JUL 31 1989

Honorable G. V. (Sonny) Montgomery
Chairman, Committee on
Veterans' Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find the Department's responses to questions raised by Representatives Applegate and McEwen following the June 14, 1989, hearing of the Subcommittee on Compensation, Pension, and Insurance. A copy of these responses is being provided to Representatives Applegate and McEwen.

Sincerely yours,

Edward J. Derwinski

Enclosure

cc: Honorable Douglas Applegate
Honorable Bob McEwen

Follow-up Questions from Chairman Applegate

Question 1: Please describe fully your plan for retaining case files at the Board after final decisions. In answering this please provide details regarding space needs as well. Also, have you considered any alternatives to retention at the Board, such as a return to the Regional Office of Jurisdiction with instructions to segregate the folder during the appeal period? Doesn't this seem like a more reasonable approach?

Answer: The problem of preserving the record in cases considered by the BVA has been discussed at length by the Department's Working Group on Judicial Review, which includes representatives from the BVA, the Office of the General Counsel, the Veterans Benefits Administration, and the Veterans Health Services and Research Administration. At this time, a decision has not been made as to where the claims folders will be kept. Specific procedures are being developed in any event so that we can quickly respond to requests for claims folder access. No single approach is entirely satisfactory. Certainly, the Board does not wish to tie up records to the extent that processing of veterans' claims will be delayed. On the other hand, it is essential that records considered by the Board in reaching a decision remain intact until they are reviewed by the United States Court of Veterans Appeals (CVA). Consideration has been given to returning the record to field facilities where they would be segregated. However, from a practical standpoint, it is impossible to ensure the integrity of the record once it has left the Board's possession. CVA personnel have indicated to members of my staff that they are very concerned about the preservation of the record and that the Court would like for the Board to keep custody of the record. Certainly, after an appeal has been filed with the Court, VA Central Office will maintain the record. Time is also a significant factor, inasmuch as the Federal Rules of Appellate Procedure would only allow a period of 40 days following the filing of a notice of appeal within which to assemble and certify the appellate record.

In weighing the alternatives, we are giving consideration to various methods of conveying necessary information to the field if the records are kept at the Board. At a minimum, the Board would make personnel available to answer telephone inquiries from the field and would electronically transmit copies of documents to the field as required.

We estimate that 5,000 to 6,000 square feet of space would be required to maintain up to 20,000 claims folders and to provide space for the employees necessary to process the folders and for review of folders by Department employees and appellants' representatives. We are currently investigating space availability.

Question 2: Please provide Committee staff with a copy of the study you refer to on page four of your written statement.

Answer: A copy of the Abt Associates, Inc., study is attached. *

Question 3: In your testimony, you made the statement that "we have been receiving more appeals over the past two years than we are capable of deciding." Have you made this known to the Secretary? What was the response, and are you asking again for an increase in FTEE in FY 1991?

* Contained in Committee files.

Congressman Applegate

Answer: While I have not yet had an opportunity to discuss this with the Secretary, I have had an opportunity to discuss this matter in some depth with the Deputy Secretary, Mr. Principi. Mr. Principi and I met on June 13 for the express purpose of discussing the BVA workload situation. I outlined our workload projections to Mr. Principi and we discussed both our current and planning levels of personnel and other resources. We also discussed the implications of a growing appellate backlog and the impossibility of reducing response time until our appellate production capacity either equals or exceeds our projected appeal receipts. Mr. Principi made it clear that he understood our position, that he strongly supported the goal of holding our response time down, and that he would see whether it would be possible to increase the level of resources available to the Board.

The FY 1991 Departmental planning process is still under development, and we are not at liberty to openly discuss the specific details or compositions of our FY 1991 budget request. Our Departmental submissions relative to this planning process do stress the close linkages among BVA response time, appeal receipts and staffing levels necessary to prevent additional increases in BVA response time, given our estimates of appeal receipts.

Follow-up Questions from Honorable Bob McEwen

Question 1: What were the four other appellate programs included in the Abt Associates, Inc., study?

Answer: The four other appellate programs included in the Abt Associates, Inc., study were the CHAMPUS program, which was the focus of the study, the Federal Employee Health Benefits program, Medicare Part A and Medicare Part B.

Question 2: What is the BVA's unit cost per decision?

Answer: The BVA unit cost per decision, as shown in the Abt Associates, Inc., study was, \$440 per decision.

Question 3: What was the focal point of the Abt Associates, Inc., study?

Answer: The focus of the study was the CHAMPUS program's appeals process. The study was designed to evaluate the CHAMPUS appeals process and to compare the CHAMPUS process to alternative processes. Results of this study were intended to assist CHAMPUS in deciding whether they should be actually running an appellate program, whether other government agencies make such major resource commitments to programs of this nature, whether they were currently performing well in this capacity, and whether the current program arrangements are suitable for future demands.

Question 4: In testimony by PVA last year, it was noted that far too many administrative errors were being made by the regional offices. In this regard, what has the Veterans Benefits Administration done to improve this situation?

Answer: The flat statement that there are "far too many administrative errors" is misleading. In proportion to the almost 5 million actions VBA claims examiners handle each year, the percentage of errors is very small. That is not to say, however, that we are complacent about our quality levels.

Our regional offices are required to conduct on-going training for their adjudicative personnel. Approximately 5 percent of all available manhours are devoted to this training. For the past 4 years, Central Office has held annual seminars for key individuals who are responsible for conducting the training in the regional offices. These sessions focus on program areas in which there have been new developments or in which problems have been identified. On returning to their regional offices, seminar participants tailor their local training programs to cover these areas. The next set of seminars will be held in August and September.

Another recent initiative in the quality area is the establishment of a centralized training academy. In the past, each regional office trained its own new adjudication employees. This system worked well when we had sufficient manpower for training tasks and while our programs were relatively straightforward. Over the last few years, however, the resources necessary to provide top-notch training in the regional offices has been subject to budgetary pressures and growing backlogs. In response to this situation, we are establishing a centralized training academy. The academy will provide 6 weeks of basic adjudicative training to all new

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claims examiners. We will start this training in mid-Fiscal Year 1990.

We are also making improvements in the statistical quality review program. Effective October 1, 1989, data will be collected which by the end of the fiscal year will enable us to determine a national error rate. At the same time, we will be taking steps to improve our sampling technique.

Question 5: If substantive appeals (claims folders) are held at the Board for 50 days, how will BVA allowances be awarded by regional offices in a timely and accurate manner? Is the Department's ADP system sufficiently equipped to accomplish this task?

Answer: It is the Department's intention that there be no delay in the award of benefits granted by the BVA. If the claim's folders are indeed held at the Board, the regional offices will use available information both on file and in the ADP system to process the award. If additional information is required, the Board will be able to telephone the information to the field office and to electronically transmit copies of the records in the claims folder.

Question 6: What happens to the claims folder when one or more issues are considered where one is denied and the other is remanded for further development? Will the BVA retain that portion of the case in order to respond to written inquiries and return the other portion to the Regional Office for development of the remanded issue?

Answer: My staff and I are of the opinion that remanding some issues for development and deciding others of their merits in cases which are subject to judicial review would lead to a great deal of confusion. In effect, this would produce different periods for appeal of issues to the CVA (Court of Veterans Appeals) in the same case, could result in cases which are in the field for development being recalled in midstream for CVA appellate processing, and would undoubtedly result in the loss of the integrity of the record upon which the issues which were not remanded were decided.

The Board's procedural manual, MBVA-1, is currently being revised to require that decisions on the merits in cases which are subject to judicial review be deferred until all necessary development is completed with respect to all issues on appeal and that all issues be decided at one time. In the interim, I have issued a numbered memorandum informing the Board Sections of this new procedure. CVA personnel have indicated that they support this procedure. (Provision will be made for making an exception to this general rule when it is clear that there can be such a complete grant of benefits with respect to an individual issue that there will be no appeal with respect to that issue.)

Question 7: To what do you attribute the increase in remanded decisions? The increase in backlog of appeals? The increased number of allowed claims?

Answer: While it is true that the BVA remand rate for the first half of FY 1989 was higher than the FY 1988 remand rate, we believe

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it is equally significant that the average remand rate for FY 1988, the most recent full year of data available, was down from the high point of FY 1987. We believe it may be premature to conclude that remand rates are rising again and we would prefer to reserve judgment on that issue until the end of this fiscal year when we will have a larger, broader, and more comparable universe of data available for comparison purposes.

The increase in backlog of appeals is simply the result of receiving a greater number of appeals than we are capable of deciding. When the rate of appeal receipts exceeds the Board's appellate decision making capacity, a backlog ensues. We received a substantially greater number of appeals at the BVA during FY 1988 than during the prior year and the rate of receipts for the first three quarters of the current fiscal year continues to exceed our original projections. We are unable to point to any obvious cause that would explain this rise in appeal receipts. We do continue to closely monitor the number of new notices of disagreements (NODs) filed in the field and the apparent high levels of new NOD receipts suggest to us that BVA appeal receipts will remain high. If no changes are forthcoming to the BVA's appellate decision making capacity, we would expect to see the backlog of appeals continue to increase.

Consistent with our response pertaining to recent changes in the VA remand rate, we would prefer to wait until the conclusion of this fiscal year when a complete year of data would be available to help decide whether there has been a statistically significant change in our allowance rate. We would be hesitant to attach any causes to this effect until we could first confirm that such a change has indeed occurred.

Question 8: How did the BVA decide on the 150 day period for holding claims folders for possible review by the Court?

Answer: Public Law 100-687 provides that an appellant may file a notice of appeal from a decision of the BVA up to 120 days after the date on which notice of the decision has been mailed to the appellant. It is likely that the Board will not be aware of the appeal to the CVA until several days after the notice of appeal has been filed with the Court. The 150 day period allows time for the Board to be notified in those cases where notices of appeal to the CVA are filed at the end of the 120 day period.

Question 9: With FTEE levels which are projected to decline, how does the Board expect to maintain quality and timeliness? Given additional FTEE, how many would the Board need to eliminate the current backlog of appeals?

Answer: We have had to reexamine our basic mission and goals in recent years in the context of an environment where staffing and other resources are declining. Our ongoing central goals relate to the volume of decisions we expect to produce, the quality level we expect to observe in the production of those decisions, and the timeliness of our decision making processes. These goals could actually be narrowed to the two issues of quantity and quality, since timeliness is inextricably linked to the quantity of appeals we are able to decide. When

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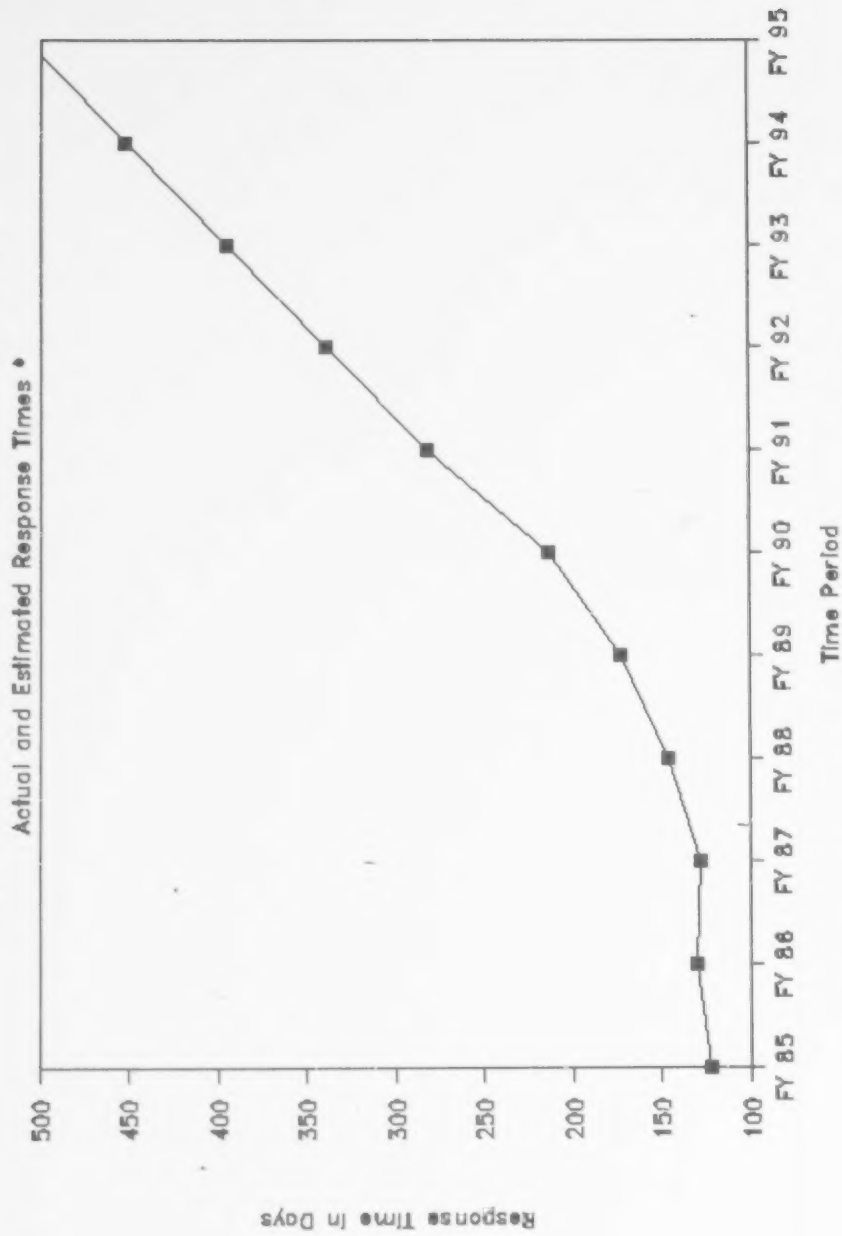
available resources do not permit us to optimize our achievements in all of these areas, we are forced to decide what tradeoffs to make among these program goals. In such instances, we have decided that the quality of our decision making must take precedence over the quantity. Consequently, if we are unable to sustain both quality and timeliness at optimally desired levels in an environment of reduced resources, we believe that the quality of our decision making should not be compromised.

The BVA FTEE level provided in the FY 1990 budget currently pending before the Congress is 403. We have projected that, given this staffing level for FY 1990 and the current rate of appeal receipts, the volume of appeals pending before the Board will have risen to around 23,000 appeals by the conclusion of FY 1990. We have furthermore projected that 39 additional FTEE would be required in FY 1991 to raise our appellate decision production to a level equal to our expected volume of appeal receipts. This 39 FTEE is in addition to the 21 FTEE that we anticipate will be required to perform required BVA functions relating to appeals filed with the CVA. Staffing at this level will not reduce the appellate backlog, but it should prevent any further backlog growth unless appeal receipts exceed current estimates. Any additional staffing could help reduce the backlog to a more reasonable level. By our standards, a reasonable level would consist of only those appeals that would represent a normal inventory of appeals in various stages of BVA processing. Ideally, we believe that this figure should be between 12,000 and 15,000 appeals.

Question 10: Is the BVA planning to acquire additional psychiatrists to its list of physicians to any of the three-member boards to handle the review of PTSD appeals?

Answer: We have no such plans at this time. Some years ago, I took steps to establish PTSD as a Section specialty so that specific Sections of the Board could gain expertise in this important area. This has allowed Board Members in these Sections to become very familiar with the subject matter. The attorney advisers and level and medical Board Members in these Sections have considerable experience and knowledge of PTSD. They can determine whether any particular aspect of the appeal warrants review by a specialist in psychiatry. These Sections have access to more expert advice when it is needed. The Board has a Staff Medical Adviser who is a psychiatrist available to provide assistance. The Board also uses the psychiatric specialists who are available to it through the Veterans Health Services and Research Administration and, when necessary, is able to request opinions from independent medical experts. In view of the extensive resources which are already available, I do not believe that hiring additional psychiatrists is necessary.

BOARD OF VETERANS APPEALS



* Based upon FTEE projections of 403 for FY 1990-95